

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

WAYMO LLC,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 17-00939 WHA
)	
UBER TECHNOLOGIES, INC.; OTTO)	
TRUCKING LLC; and OTTOMOTTO)	
LLC,)	
)	
Defendants.)	
)	

San Francisco, California
Wednesday, September 27, 2017

TRANSCRIPT OF PROCEEDINGS

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Wednesday - September 27, 2017

7:59 a.m.

P R O C E E D I N G S

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THE COURT: Okay. Welcome. Please be seated. Let's call the case.

THE CLERK: Calling Civil Action 17-939, Waymo, LLC, versus Uber Technologies, Inc., *et al.* Counsel, please approach the podium and state your appearances.

MR. VERHOEVEN: Good morning, Your Honor. Charles Verhoeven. And with me is David Perlson, Melissa Baily, Andrea Roberts, Lindsay Cooper, Felipe Corredor, and David Eiseman. We're ready to go.

THE COURT: Thank you.

MR. GONZÁLEZ: Good morning, Your Honor. Arturo González, Michael Jacobs, from Morrison Foerster, for Uber.

MS. DUNN: Good morning, Your Honor. Karen Dunn and Meredith Dearborn, from Boies Schiller, for Uber.

MR. CARMODY: Good morning, Your Honor. Bill Carmody, with Susman Godfrey. And with us I have Joe Grinstein and Shawn Rabin; Cory Buland, Ian Gore, and Halley Josephs.

THE COURT: Good. Welcome.

MR. CHATTERJEE: Good morning, Your Honor. Neel Chatterjee and my colleague, Brett Schuman, for

1 Otto Trucking.

2 **MR. SCHUMAN:** Good morning, Your Honor.

3 **SPECIAL MASTER J. COOPER:** Good morning, Your Honor.
4 John Cooper, Special Master.

5 **THE COURT:** Welcome.

6 One preliminary thing for me, and we'll get right into it.
7 Last night a motion came in from Waymo, asking that we close
8 the courtroom during the trial. And I want to give members of
9 the public as well as the press an opportunity to submit your
10 brief before the Court rules on this. If you want to be heard
11 on this, I invite you to submit a brief; but you need to do it
12 soon, because the trial is set for October 10th. So please
13 keep that deadline in mind.

14 We're here for a final pretrial conference. The lawyers
15 have filed voluminous and many different motions, so there's
16 not time to hear every motion. Some will be submitted on the
17 papers. That's just the way it is, because you lawyers cannot
18 be brief. Some of these are many thousands of pages long.

19 There are some that I want to hear, and I will call those
20 out. And if there's one or two that you feel desperate to have
21 heard, then I will try to work that in today. So be thinking
22 about it; but probably one-third to one-half of all of the
23 pending motions will be submitted on the paperwork. All right?

24 Now let's go to the some of the motions for summary
25 judgment. I'm very familiar with most of this, but I'm going

1 to give each side about five minutes to argue your points.

2 One of the motions -- one of the motions is to knock out
3 the Affirmative Defenses. All right? The Waymo motion to
4 knock out Affirmative Defenses. Anything more you want to say?

5 **MR. VERHOEVEN:** I believe we argued that already.
6 We'll submit on the papers.

7 **THE COURT:** All right. How about the other side?

8 **MR. CHATTERJEE:** Your Honor, same position. We'll
9 submit on the papers, given the argument last week.

10 **THE COURT:** Same?

11 **MR. CARMODY:** Yes.

12 **THE COURT:** Does Mr. Chatterjee now speak for all of
13 the defendants?

14 **MR. GONZÁLEZ:** On that issue, Your Honor, yes.

15 **THE COURT:** All right. Excellent. Thank you.

16 I have here a Draft Order, which I'm sure you would like
17 to see; but not yet.

18 All right. The Uber motion to knock out Trade Secret
19 Number 9 -- we already heard that. Didn't we hear that
20 already?

21 **MR. JACOBS:** Yes, Your Honor.

22 **MR. VERHOEVEN:** Yes, Your Honor.

23 **THE COURT:** Okay. We're not going to hear that
24 anymore.

25 The Otto Trucking motion to -- I thought it was to get out

1 of the case totally. Right?

2 **MR. CHATTERJEE:** Yes, Your Honor, that was.

3 **THE COURT:** All right. Hadn't you argued that
4 already?

5 **MR. CHATTERJEE:** We argued that last week, Your
6 Honor.

7 **THE COURT:** Okay. So good. All right. So then we
8 go to Trade Secret Number 96. And most of this has already
9 been argued, but there is the new piece involving the *Daubert*.
10 Right?

11 **MR. JACOBS:** Yes, Your Honor. We did address the
12 *Daubert* aspect before, Your Honor, last time, as well.

13 **MR. VERHOEVEN:** Yeah. That was argued, as well,
14 Your Honor.

15 **THE COURT:** All right. Okay. Good.

16 So then I owe you an Order on all of that, which I have a
17 draft of right here. So that will be coming in due course, I
18 think. Okay.

19 Now we go to some of your motions *in limine*. And I would
20 like to start with the damages motion involving Mr. Wagner. So
21 who wants to start there?

22 **MR. CARMODY:** It's our *Daubert* motion, Your Honor.
23 Bill Carmody, for Uber.

24 **THE COURT:** All right. Now, if there's something
25 that is a trade secret, don't bring it up. However, if it's

1 just supposedly attorneys'-eyes-only proprietary information,
2 we're now at the trial stage, so I give you permission to use
3 your discretion to say whatever you want. We're not going to
4 exclude the public and the press merely because you lawyers
5 want to fight over somebody's internal profit information. All
6 right. So -- but exercise care, and don't bring up something
7 that you don't really need to bring up.

8 All right. Go ahead. What was your point?

9 **MR. CARMODY:** Thank you, Your Honor.

10 To put in context just how speculative and unreliable
11 Mr. Wagner's damages are, we only need to go back to last week
12 in our hearing we had. And at the end of discussing
13 Trade Secret 9, the Court was kind of guesstimating the value.
14 And I think Your Honor talked about numbers of 15- to \$150,000.

15 Mr. Wagner put the value of Trade Secret Number 9 at
16 \$283 million. And, if the Court recalls, Velodyne was also
17 involved in doing the same sort of adjustments. That
18 \$283 million number represents a third of the value of the
19 entirety of Velodyne at that time.

20 It seems, though, Your Honor, since last week the other
21 side has lowered their damages. In other words, they accused
22 me of kind of falsely characterizing your 2.6 billion. And now
23 it seems that they're dropping their optimistic case, and
24 they're not going to put that before the jury; but the point
25 is, Your Honor, even if they reduce their damages from 2.6 to

1 \$1.85 billion, we are still left with the flawed methodologies
2 of Mr. Wagner.

3 And what I was hoping to briefly do, Your Honor, is walk
4 you through each of his --

5 **THE COURT:** Well, here's the part --

6 **MR. CARMODY:** -- models.

7 **THE COURT:** -- that I want you both to address.

8 **MR. CARMODY:** Sure.

9 **THE COURT:** I think I know what his methodology is.
10 He took that memo from Qi. Is that her name: Ms. Qi?

11 **MR. CARMODY:** Qi. Yes, Your Honor.

12 **THE COURT:** And it says how much time they would save
13 by acquiring NewCo. Right?

14 **MR. CARMODY:** Yes.

15 **THE COURT:** All right. NewCo, though, is not the
16 trade secrets. NewCo is everything: Trade secrets, and just
17 ordinary skill and expertise.

18 I couldn't find anyplace in that Report where he
19 apportioned that. In other words, what part of that estimate
20 was attributable to the trade secrets in question, versus just
21 the fact that Levandowski and his team of dozens of engineers
22 were well trained and skilled in the art, which anyone had the
23 right to plunder and to steal away? That's the American way.

24 So let me ask you, Ms. Baily. I didn't see anyplace where
25 he apportioned that. So isn't that a fundamental flaw?

1 **MS. BAILY:** Well, Your Honor, Mr. Wagner does
2 apportion per trade secret. And I'll attempt --

3 **THE COURT:** No, no, no, no, no. I looked at that
4 part. He only apportions among the trade secrets. He doesn't
5 say how much was appportioned to the legitimate acquisition;
6 meaning just the skill and intelligence and experience of those
7 at NewCo.

8 **MS. BAILY:** Well, I do think, Your Honor, if I may,
9 that in some ways the two are conflated in the way that
10 Mr. Wagner did apportion.

11 **THE COURT:** He didn't apportion anything. He just
12 took it, lock, stock, and barrel, and said her number of
13 \$1.6 billion is all trade secrets.

14 **MS. BAILY:** Well, what he did, Your Honor, is he took
15 Uber's estimate with respect to most trade secrets; not all
16 trade secrets. He took Uber's estimate of the time that Uber
17 thought it would take to design around a trade secret.

18 **THE COURT:** Yeah.

19 **MS. BAILY:** And -- which, of course, is conservative,
20 because designing around a trade secret versus coming up with a
21 trade secret from whole cloth is two totally separate things.
22 And he applied the modeling that underlies that slide, which is
23 more than just a slide. And I would like to talk about that
24 today, but he basically applies Uber's own model evaluating the
25 accelerated development that they would get from the

1 acquisition of Ottomotto, and applies it only to what Uber says
2 is the time it would take them to design around a trade secret.

3 **THE COURT:** No. They -- no. Mrs. Qi didn't say
4 anything about trade secrets.

5 **MS. BAILY:** This is how Mr. Wagner apportioned.

6 **THE COURT:** He didn't apportion any of that
7 1.8 million to anything, other --

8 Everything got apportioned to one trade secret or another.

9 Wait. Let me just stop.

10 Am I right about that?

11 **MR. CARMODY:** You're exactly right. That's --

12 **THE COURT:** All right. Tell me. Is that correct, or
13 not?

14 **MS. BAILY:** I don't believe that that's correct.

15 **THE COURT:** All right. Show me in the Report. Hand
16 up to me the page where he apportioned any of that money to
17 something other than -- to anything other than trade secrets.

18 **MS. BAILY:** Okay. Well --

19 **THE COURT:** You can't do it.

20 **MS. BAILY:** Phrased that way, no, I can't do that.

21 **THE COURT:** Yeah. Of course, you can't. Isn't that
22 a fundamental flaw?

23 **MS. BAILY:** No, it's not.

24 **THE COURT:** To me, it is hard to understand how
25 somebody could say, *We're acquiring this big NewCo. And here*

1 are some trade secrets we're acquiring. And here is
2 Mr. Levandowski -- the guy in the Smithsonian; and a brilliant
3 man -- and all of his team. And all of that is perfectly
4 legitimate to steal away, as the team. And the only part that
5 you can't steal is the trade secrets.

6 And yet you're saying that everything in those trade
7 secrets, some of which are marginal, amounts to the entire
8 package.

9 To me, that can't -- it has to be apportioned.

10 **MS. BAILY:** So I am sorry, Your Honor. I just
11 fundamentally disagree. I think there are two --

12 **THE COURT:** Then the Federal Circuit can sort this
13 out, maybe, but --

14 **MS. BAILY:** Can I just state for the record my
15 disagreement --

16 **THE COURT:** I want you to state your --
17 I'll be quiet.

18 **MS. BAILY:** -- with your characterization, if that's
19 all right, just for a moment?

20 **THE COURT:** All right. Go ahead.

21 **MS. BAILY:** I agree with Your Honor that Mr. Wagner
22 did not list in his Report values associated with non-trade
23 secrets.

24 However, he did take into account, trade secret by trade
25 secret, the time that Uber said it would take to develop only

1 that trade secret.

2 And so, for example, if Uber said it would take six days
3 to develop only that trade secret, then Mr. Wagner did
4 apportion, because he said, *The development of that trade*
5 *secret, only, would get Uber six additional days; and I'm going*
6 *to take those six days, and look at what Uber values that*
7 *accelerated development to be for only those six days.*

8 And so he is looking only at the trade secret. He does
9 assume liability. He assumes that the trade secret was
10 misappropriated. And so there was not this general expertise
11 being applied in those six days. He's saying that the trade
12 secret was misappropriated. He's saying, *Uber said they could*
13 *design around it in six days.* He's saying, *Okay. Well, that's*
14 *a conservative estimate of what Uber would say it would take to*
15 *develop only that trade secret.* And he does assume liability.
16 He does assume that it's misappropriated.

17 **THE COURT:** It's perfectly okay to assume liability.
18 That's legit. I don't have a problem with that, because that's
19 what a damages expert does, but all right.

20 He assumes that there's one to two years; that 1.6 billion
21 is the two-year. That's, to my mind, about 700 days.

22 But you're saying that he apportions, somehow, the total
23 to six days?

24 **MS. BAILY:** For one trade secret. So let's just take
25 Trade Secret Number 7. He apportions to 18 days, because Uber

1 said it would take 18 days to design around that specific trade
2 secret.

3 **THE COURT:** All right. So somewhere he's saying --
4 What I think you're telling me, but maybe I'm wrong, is
5 that he took the \$1.8 billion; divided it by about 700 days in
6 a year; and then multiplied it by 18, to apportion it to that
7 particular trade secret?

8 **MS. BAILY:** Yes, because Uber said it would take 18
9 days to design around that trade secret.

10 **THE COURT:** Hand up to me in the Report where that
11 occurs.

12 **MS. BAILY:** Well, so -- I have notes on my copy.
13 On page --

14 **THE COURT:** I'd like somebody to hand it up to me.
15 It may be the MoFo people can hand it up to me.

16 **MS. BAILY:** These notes are factual.

17 So, looking at page 3, there's a chart.
18 (Whereupon a document was tendered to the Court.)

19 **MS. BAILY:** And it shows each trade secret, and the
20 time that Uber said it would take to design around that trade
21 secret; and that trade secret, only.

22 **THE COURT:** All right. Just -- okay. Number.
23 Where's the one that was the six days, so that I can focus
24 on your example?

25 **MS. BAILY:** So 18 days was my example.

1 **THE COURT:** All right. Let's take that one.
2 Trade Secret Number 7. Eighteen days. So he's saying that
3 that would be \$43 million.

4 **MS. BAILY:** For 18 days that Uber said it would take
5 to design around that trade secret, and only that trade secret.
6 So he's not just taking the full value.

7 And I agree with Your Honor that there's nowhere in the
8 Report where he says, *Let's attribute that amount to non-trade*
9 *secrets*; but he does focus on only on the trade secret, and
10 only on what Uber said the time it would take to design around
11 that trade secret.

12 **THE COURT:** All right. So what do you say to that?
13 Let me make sure I've got your name.

14 **MR. CARMODY:** Bill Carmody, Your Honor.

15 **THE COURT:** Yes. Bill Carmody. Okay. What do you
16 say to that point?

17 **MR. CARMODY:** Two things, Your Honor.

18 First of all, you're absolutely correct in understanding
19 that that \$1.6 billion has nothing to do with the trade secrets
20 at issue.

21 But secondly, what Counsel is talking about now is she
22 says, *That problem's fixed, because what he does is he*
23 *apportions it on a trade-secret-by-trade-secret basis, by*
24 *looking at the time to independently develop each and every one*
25 *of these trade secrets.*

1 But here's the problem with that, Your Honor. If you can
2 picture the slide in your head -- and I have a copy, if the
3 Court wants to see the Nina Qi Slide. That's a slide,
4 Your Honor, of earnings. It's profits.

5 The only way you get to profits is you've got to
6 commercialize the AV that Uber has. It doesn't matter that you
7 might develop some trade secrets. What happens if you kind of
8 hurry up and wait? You develop the trade secrets, but guess
9 what. You have a fully autonomous vehicle ready to go, but the
10 regulators aren't ready for you.

11 That's the analytical shortcoming in this second variable.
12 He conflates. What Wagner does is he conflates independent
13 time to develop, with the AV commercialization time. And AV
14 commercialization is the only thing that gets you profits.
15 Development doesn't get you profits. You've got to
16 commercialize to get profits. That's the problem.

17 **THE COURT:** All right. Wait.

18 **MS. BAILY:** So --

19 **THE COURT:** I want to --

20 You got off onto a different point. It's maybe a valid
21 point, but that's not the one I'm focusing on.

22 **MR. CARMODY:** Okay.

23 **THE COURT:** All right. Looking at what Ms. Baily
24 showed me, Number 25 -- Trade Secret Number 25 -- he has it
25 down as \$1.69 billion. So there's no apportionment on that

1 one.

2 **MS. BAILY:** Right. And I will explain Trade Secret
3 25.

4 Can I just address this -- something else related to my
5 first point, in terms of just apportionment generally?

6 **THE COURT:** Mm-hm.

7 **MS. BAILY:** You know, we started out by saying that
8 there's a slide that values NewCo. And Your Honor was saying,
9 *Well, where is everything else besides the trade secrets in*
10 *NewCo?*

11 That slide is actually valuing time savings; time savings
12 in development, due to the acquisition. So it's not as broad
13 as, perhaps, Your Honor had in mind.

14 **THE COURT:** But the acquisition is trade secrets plus
15 everything else that's legit.

16 **MS. BAILY:** Agreed. And so then when you go from the
17 time-savings pie, then Wagner apportions as I've described.

18 Now, with respect to Trade Secret Number 25, it is
19 apportioned. The reason why two years is applicable to Trade
20 Secret Number 25 is because, in general terms, if you recall
21 Trade Secret 25, it is the specification; the edge cases that
22 Waymo determined it needed to design its LiDAR to. So it's the
23 test cases, and all of the parameters that govern its design.

24 And how did Waymo get to figure that out?

25 Waymo spent more than two years doing simulated driving

1 and real-world driving. That's the only way that you can come
2 up with a compilation of these edge cases, the scenarios, and
3 then the parameters that you want to hit, so that you have a
4 safe, cost-effective LiDAR system. So that trade secret is
5 particularly valuable.

6 And it actually took Waymo way more than two years to
7 develop, because it is determined by iteration upon iteration
8 and learning upon learning of miles driven.

9 **THE COURT:** Well, I suggest to you that Waymo didn't
10 spend \$1.69 billion coming up with that.

11 **MS. BAILY:** Well, it's pretty close.

12 **THE COURT:** I don't believe that. I don't -- is that
13 in this Report somewhere?

14 **MS. BAILY:** That is in Waymo's interrogatory
15 responses. I don't know if those responses are cited in this
16 Report.

17 **THE COURT:** The idea that it would take you that long
18 and that much money to come up with the parameters seems to me
19 to be fantastic.

20 **MS. BAILY:** It is the core of LiDAR design. You
21 cannot design a LiDAR system without figuring out what the edge
22 cases are, and how to plan for them.

23 **THE COURT:** Of course.

24 **MS. BAILY:** And that --

25 **THE COURT:** Yeah, but that still doesn't --

1 That's not going to take you \$1.69 billion.

2 **MS. BAILY:** It did, because you have to create the --

3 **THE COURT:** That 1.69 billion would include a lot of
4 things, too.

5 **MS. BAILY:** You have to -- it's all necessary to the
6 development of that trade secret. You have to create the
7 simulations. You have to create the hardware. You have to
8 drive the miles. You have to --

9 **THE COURT:** All right. What else would you like to
10 say?

11 **MR. CARMODY:** Your Honor, I'm here to answer any
12 question you have.

13 **THE COURT:** All right. I have no more questions.
14 Do you have anything more, Ms. Baily?

15 **MS. BAILY:** Well, I would like to address the other
16 point that was raised.

17 **THE COURT:** Go ahead.

18 **MS. BAILY:** The point that was raised was -- and the
19 impression created by the briefing was that Ms. Qi's analysis
20 was this one-off by a rogue employee that was never analyzed by
21 anybody.

22 **THE COURT:** You're right on that. I mean, it just
23 amazes me that Uber would make such an argument; but no. She
24 is stuck. Uber is stuck with -- if it comes down to that, it's
25 a jury question. And the idea that the Judge is going to save

1 Uber because they've got some employee who put a big number
2 down there -- no. That doesn't work.

3 You're right about that, Ms. Baily.

4 How many times has this expert been excluded by other
5 Judges?

6 **MR. CARMODY:** We have found several, Your Honor.

7 **THE COURT:** Exactly how many?

8 **MR. CARMODY:** I think we found three on this very
9 issue, which is speculative damages, where he's gotten struck
10 for speculative --

11 **THE COURT:** Can you tell me who the Judges were who
12 excluded?

13 **MR. CARMODY:** I can't.

14 What we did do: We did cite a couple of those,
15 Your Honor, in our brief. We can certainly get you something
16 today to tell you exactly the Judges.

17 **THE COURT:** By noon today, would you please give
18 me --

19 **MR. CARMODY:** Absolutely.

20 **THE COURT:** I'd like copies of the Orders where he
21 was excluded; every Order of any type where Mr. Wagner was
22 excluded.

23 **MS. BAILY:** Your Honor, just for the record, he's
24 been admitted to testify in over a hundred cases.

25 **THE COURT:** Okay. All right.

1 By the way, is he an economist?

2 MR. CARMODY: He's a lawyer.

3 THE COURT: I know he's a lawyer.

4 MS. BAILY: He's an engineer.

5 THE COURT: And I know he has a CPA.

6 Is he an economist?

7 MR. CARMODY: No.

8 MS. BAILY: Well, I can -- his CV is in the record,
9 so --

10 THE COURT: I don't think he's an economist, but is
11 he? I want to make sure I'm right about that.
12 (Discussion held off the record.)

13 MS. BAILY: My colleague tells me he's a CPA, a
14 lawyer, and an engineer.

15 THE COURT: All right. Now -- okay. Thank you.

16 MS. BAILY: Your Honor, for the record, if you have
17 any other questions about apportionment, I would like the
18 opportunity to address them, because --

19 THE COURT: Time is short, Ms. Baily. We've got a
20 lot here. It's a case you want to get to trial, and we've got
21 a lot of other motions to take up. It's been adequately
22 briefed, in my opinion.

23 All right. We're going to go to the next motion.

24 MR. SCHUMAN: Your Honor, before we do, may I ask, on
25 behalf of Otto Trucking, just one minute, Your Honor?

1 **THE COURT:** Yeah. What do you want to say?

2 **MR. SCHUMAN:** Well, Your Honor, Otto Trucking joined
3 the motion to exclude Mr. Wagner.

4 We also pointed out that Mr. Wagner's opinions had no
5 applicability to our client, Otto Trucking. I think the
6 discussion the Court just engaged in with counsel validated
7 that; but the point I want to make is his deposition occurred
8 last Friday. I participated in that deposition. And he
9 confirmed that his opinions have no applicability to my client,
10 Otto Trucking, whatsoever.

11 I asked him how many of the 64 hours he spent on his
12 opinions did he focus on Otto Trucking.

13 He said exactly zero.

14 He has three opinions, as the Court knows: Two
15 unjust-enrichment opinions, and one reasonable-royalty opinion.

16 And I asked him as to each opinion do they have any
17 applicability to Otto Trucking; and he said no.

18 **THE COURT:** I do have a question about the reasonable
19 royalties. As I read the Report, his reasonable-royalty number
20 is even higher than the other number.

21 **MR. SCHUMAN:** That is accurate.

22 **THE COURT:** Is that true?

23 **MS. BAILY:** That is true.

24 And my understanding is that's typical; that unjust
25 enrichment is the floor, and that reasonable royalty and lost

1 profits are often higher than an unjust-enrichment analysis.

2 **THE COURT:** All right. Thank you for that.

3 **MS. BAILY:** Should I respond to the point on Otto
4 Trucking?

5 **THE COURT:** Yes, if you wish.

6 **MS. BAILY:** Otto Trucking well knows that Waymo has a
7 joint and several liability theory. They'd like to shortcut
8 that and just say, *Never mind. You'll just get that money from*
9 *Uber*; but Waymo has a right to try to a jury the joint and
10 several liability piece.

11 And so this notion that Otto Trucking -- a damages
12 expert -- this relates to the *Daubert* on him and Malackowski,
13 as well -- should get up and tell the jury, *Oh, Otto Trucking*
14 *didn't -- there's no liability for Otto Trucking. There's no*
15 *damages. And Waymo can just go to Uber*, is completely
16 improper.

17 **MR. SCHUMAN:** Your Honor, I was only addressing the
18 *Daubert* and Mr. Wagner's opinions, which have no applicability
19 to Otto Trucking.

20 Counsel just raised joint and several liability. That was
21 briefed and argued in summary judgment last week, so I'm not
22 going to revisit that.

23 On the point, though, about Uber [sic] -- I'm sorry --
24 Waymo wanting to go to a jury on joint and several liability, I
25 would just point out, Your Honor, that is not a jury question.

1 That is a Judge question. And that's exemplified by the fact
2 that they did not submit any proposed jury instructions on
3 joint and several liability, because there are none.

4 **THE COURT:** All right.

5 **MR. SCHUMAN:** So that's a summary-judgment issue.

6 **THE COURT:** Ms. Baily, you get the last word, and
7 then we're moving on.

8 **MS. BAILY:** Well, that's just not true about the jury
9 instructions. There are factual issues underlying the question
10 of joint and several liability, and the jury should be able to
11 determine those.

12 **THE COURT:** Okay. All right. Just a moment. We'll
13 go to another motion. On the one -- and I guess it's
14 Motion Number 2 for the Defense. Motion *in Limine* Number 2.
15 Who's going to argue that?

16 **MS. DEARBORN:** That's me, Your Honor.

17 **THE COURT:** All right. I want to give you a
18 tentative thought, and let both sides respond. It seems to me
19 that if we allow Waymo to lay before the jury the assertion of
20 privilege over the Due Diligence Report --

21 And, by the way, there came a point where Uber did not
22 oppose producing. It was Levandowski who was the one who was
23 resisting it.

24 **MS. DEARBORN:** That's right, Your Honor.

25 **THE COURT:** He did not appeal to the Federal Circuit

1 on that.

2 **MS. DEARBORN:** That's correct.

3 **THE COURT:** Anyway -- but if we allow all of that,
4 which is possibly what we're going to do, then without any
5 question, in my mind, the other side gets to show how you
6 stonewalled on this guy who said that your trade secrets were
7 weak. What's his name? Sasha?

8 **MS. DEARBORN:** Zbrozek. Yes, Your Honor.

9 **THE COURT:** Yeah. The Waymo guy who was --
10 And then he was saying to your own lawyers that you had a
11 weak case on trade secrets.

12 And you stonewalled, and concealed that.

13 **MS. BAILY:** Your Honor --

14 **THE COURT:** All right. Now wait.

15 Now, you have an argument that you acted in good faith.
16 Okay. But they've got an argument they acted in good faith.
17 Both of you have an argument you acted in good faith. Though
18 if it's good for the goose, it's good for the gander. That's
19 kind of where I'm coming out.

20 So you get to go first, Ms. Baily.

21 **MS. BAILY:** So first of all, I just have to correct
22 the record, because Sasha did not say what Your Honor said he
23 said.

24 **THE COURT:** That's one way to construe it.

25 **MS. BAILY:** He did not say that.

1 **THE COURT:** All right. What did he say?

2 **MS. BAILY:** Sasha said that historically software,
3 like Google's core search algorithm, is of the highest priority
4 at Google.

5 **THE COURT:** Are you going to say that with a --
6 Ms. Baily, I read it, myself. He said lot more than that.
7 Okay. Just stop there.

8 Ms. Meredith Dearborn, would you read to me what he
9 actually said, instead of what Ms. Baily claims he said?

10 **MS. DEARBORN:** I was just looking it up, Your Honor.
11 Just one minute.

12 **THE COURT:** Now, I don't want the members of the
13 press out there to --

14 This is what we're up against: Half-truths.

15 Would you please read to me the part that you like?

16 **MS. DEARBORN:** *It is not particularly surprising*
17 *that --*

18 And I -- this is an e-mail, Your Honor, so there have been
19 some corrections; but I can --

20 **THE COURT:** Read the original testimony; not the way
21 the lawyers fixed it up.

22 **MS. DEARBORN:** Okay. I do -- I have -- I actually do
23 not have that e-mail with me. I just have the excerpt, but I
24 can read the excerpt.

25 **THE COURT:** Well, whatever --

1 I want the actual testimony.

2 MS. DEARBORN: Okay.

3 THE COURT: Do you have it?

4 MS. BAILY: Your Honor, while they're finding the
5 actual testimony --

6 THE COURT: No. I want Ms. Dearborn.

7 You -- you didn't give me the full truth.

8 MS. BAILY: No. To defend myself, I was responding
9 to the characterization that you made with an equally plausible
10 characterization of the intent of that statement.

11 THE COURT: Yeah. Okay. Read it to me, please.

12 MS. DEARBORN: All right. One portion of this e-mail
13 says, *It's not particularly surprising that he might check*
14 *things out once, in the misguided dream of maybe making*
15 *individual contribution, or maybe taking a look at the process*
16 *of a widget. It clearly wasn't part of his routine. Doesn't*
17 *ring alarm bells for me.*

18 THE COURT: What was the thing about "low-grade"?
19 There was some phrase like "low-grade."

20 MS. DEARBORN: *It's all electronic.*

21 I apologize, Your Honor. I should have started reading
22 the e-mail earlier.

23 *It's all electronics designs, schematics, and PCB layouts,*
24 *and the component library for their creation. It was*
25 *considered low value enough, that we had even considered*

1 *hosting it off of Google infrastructure.*

2 **THE COURT:** All right. Now, okay. You got a
3 come-back to that. You can put, Ms. Baily, your -- what he
4 said later on, after the lawyers got to him; but a jury could
5 reasonably conclude from what I just heard from his actual
6 e-mail that you have been blowing this case way out of
7 proportion. They could also conclude that these are genuine
8 trade secrets.

9 So -- but the fact is that you stonewalled, and didn't
10 turn this information over until very late in the game. And
11 you claimed that it was because of privilege, which the Judge
12 overruled you on.

13 All right. Now, maybe you had a good-faith basis; but
14 they had a good faith-basis on the Due Diligence Report. And
15 if one is going to come in, the other's going to come in.

16 **MS. BAILY:** Can I just respond quickly for the
17 record? I apologize.

18 And I apologize also that you felt that I gave a
19 half-truth. I was responding with respect to equal
20 characterizations --

21 **THE COURT:** I accept what you're saying. All right.
22 Fine.

23 **MS. BAILY:** But with respect to Sasha, just for the
24 record, the privilege claim was raised very early on in this
25 case. And it wasn't until weeks ago that there was any

1 question as to their privilege. And so the stonewalling issue
2 is not the same for both sides.

3 **THE COURT:** It's so close that if one comes in, the
4 other's going to come in. It's so close that they --

5 You know, this was a busy case. You're blaming them,
6 because you were moving the case along so fast, they didn't
7 have time to bring this up until later; and when they did bring
8 it up, you lost. And the privilege was pierced. No privilege.
9 It never should have been asserted. And then it -- the fact
10 comes out that we just heard. So I'm positive that part is
11 right. So the due diligence. Sasha. Stonewalling.
12 Stonewalling.

13 All right. So I'm going to give you a chance to try to --
14 all right. You have tried to talk me out of it.

15 All right. What do you have to say about that?

16 **MS. DEARBORN:** Your Honor, if this -- if the fact
17 that there have been overruled claims of privilege comes in in
18 this case, we would absolutely agree that what's good for the
19 goose has to be good for the gander.

20 And we would also urge the Court that that -- that that
21 would need to come in in the form of a neutral jury
22 instruction, so as not to waste the jury's time with
23 evidence -- or argument of the lawyers.

24 **THE COURT:** That could be one thing, but maybe you
25 want to get on the stand. Both sides want to get on the stand.

1 Ms. Baily wants to get on the stand and say how good-faith she
2 was. And maybe you want to do the same thing, if that's the
3 way you lawyers want to waste the time that you're going to be
4 getting in this case.

5 You told me it was a two-week trial. That's what you told
6 me last time. That translates to, at best, about 15 hours of
7 evidence time per side, counting cross. I know how to do the
8 math. Actually, 15 hours will be a little bit more than two
9 weeks.

10 So if that's the way you want to use some of your time,
11 with you lawyers on the stand, explaining how you acted in good
12 faith, I'm okay with that.

13 **MS. DEARBORN:** Well, Your Honor --

14 **THE COURT:** It's your time.

15 **MS. DEARBORN:** You just raised wasting time, which is
16 precisely the problem, because if Waymo is going to stand up
17 and say, you know, the Stroz Report was originally -- they
18 originally exerted privilege over it. That went up on appeal.
19 And then we have to rebut that.

20 **THE COURT:** If they say the word "they," I'm going to
21 interrupt and tell the jury that's not a true statement. It
22 wasn't "they." It was Levandowski who appealed. That's the
23 way you always present it, is "they."

24 But I know the truth. And the truth is that Uber was
25 willing to turn that over earlier; much earlier.

1 So if you do present that argument, you've got to say
2 Levandowski caused the delay; not that Uber did.

3 **MS. BAILY:** I do want to say for the record that as
4 of Monday, we were still receiving documents from Uber's
5 privilege log that should have been produced the day the
6 Federal Circuit ruled. And so the notion that Uber says in its
7 papers that it was standing by and ready to produce the
8 materials is not the case. We're still getting them, and we're
9 days away from trial. We've been severely prejudiced.

10 MoFo has had these materials since they created this
11 correspondence, and since they were on this correspondence.
12 And they've had that the entire length of this case. It's
13 volumes of documents.

14 **THE COURT:** Is that true, that you're still producing
15 materials?

16 **MS. DEARBORN:** Unfortunately, I have to let my
17 colleagues address the state of document production.

18 **THE COURT:** All right. Let's hear from Mr. González,
19 who's always telling me they're going to produce them the next
20 day.

21 **MR. GONZÁLEZ:** Your Honor, they've received virtually
22 everything.

23 There were a handful of documents that, because of the
24 type of documents that they were, they were difficult to
25 convert into the appropriate format.

1 And also, there were a few documents that were clawed
2 back -- Privileged Documents that were produced -- and we're
3 producing redacted copies of the same documents.

4 But this is -- this is not even a needle in the haystack.
5 They've got the stuff. They've had the stuff.

6 **MS. BAILY:** They should have had it ready to go the
7 day the Federal Circuit ruled, considering we have a trial on
8 October 10th, and that MoFo has had these documents all along.

9 **MS. DEARBORN:** And, Your Honor, if we were to go
10 there, I would say that Otto Trucking had to file four motions
11 to compel on the issue of Waymo's selective waiver. We had to
12 take this before Judge Corley multiple times. And we only got
13 these -- the documents at issue for Uber's -- or sorry -- for
14 Waymo's selective waiver close to the end of the case, as well.

15 **THE COURT:** All right. All right.

16 **MS. DEARBORN:** Your Honor --

17 **THE COURT:** We've got to move on.

18 **MS. DEARBORN:** -- I think the right thing to do here
19 would be not to introduce any of this evidence, at all.

20 **THE COURT:** Well, I'm not sure of that.

21 **MS. DEARBORN:** Well --

22 **THE COURT:** I think it's useful for the American
23 juries to see. See, you lawyers want it all to be that you
24 have halos over your head; but the truth is that litigation is
25 not something so pretty sometimes, and you lawyers are

1 responsible. And I think it's sometimes useful for the lawyer
2 who has the halo over their head -- the fake halo over their
3 head -- for them to be exposed for what really goes on.

4 So I would kind of welcome a trial where the lawyers have
5 to testify and explain their conduct to a jury sometime. Maybe
6 this is not the case, but I'm thinking about it.

7 All right. Looks like the big gun has come forward.

8 **MR. VERHOEVEN:** Your Honor, I just wanted to tie this
9 in. As you may recall, earlier when we had our first round of
10 MILs -- our -- the first set, one of them was related to the
11 statement that Uber had made that they intend to present to the
12 jury the steps they took to search their servers after the
13 Complaint was filed --

14 **THE COURT:** Right.

15 **MR. VERHOEVEN:** -- and the inspections.

16 **THE COURT:** And I said that some of that could come
17 in. Didn't I say that?

18 **MS. DEARBORN:** I think Your Honor --

19 **MR. VERHOEVEN:** What I had said to you, Your Honor,
20 is if that comes in, then we should be able to test that, and
21 we should also be able to counter that. I think that ties
22 right in with what we're talking about here. And I just wanted
23 to reference it.

24 **THE COURT:** Oh, okay. So they get to put in those
25 three things.

1 You get to put in the due diligence, stonewalling --
2 except not by Uber.

3 And then they get to put in the Sasha stonewalling.

4 To me, that's the way it ought to come out.

5 **MR. VERHOEVEN:** Well, but one issue -- and I
6 apologize if it's not formally up here -- is that we've had
7 zero discovery on their alleged inspections and whatnot.
8 They've withheld all of those as privileged. We've moved to
9 compel.

10 I don't know the current status is; but you know, we're
11 talking about rulings of waiver. Using this inspection as a
12 sword --

13 **THE COURT:** Is that in one of my motions now? I'm
14 not familiar with any stonewalling on this.

15 **MR. VERHOEVEN:** I think it was previously briefed.
16 And I just wanted to remind Your Honor.

17 **THE COURT:** Well, is that true?

18 **MR. GONZÁLEZ:** I have no clue what he's talking
19 about.

20 There were three points. One of the three points was the
21 fact that they have come into our house 12 times and found
22 nothing. I don't know what he's talking about: Withholding
23 privilege. They've been to our house --

24 **THE COURT:** Let's just pause.

25 Are you saying that they've --

1 It is true you've been there many times to conduct --
2 What privilege are they withholding?

3 **MR. VERHOEVEN:** I'm talking about there --
4 There are three things they wanted to say.

5 **THE COURT:** Yeah.

6 **MR. VERHOEVEN:** And he selectively chose that one.

7 **THE COURT:** Which one is the one that you --

8 **MR. VERHOEVEN:** I'm talking about his statement to
9 your Court, to Your Honor; his representation that he was going
10 to tell the jury about all of this inspection they did;
11 searching they did. "Inspection" is the wrong word --
12 searching they did. I don't know how many servers. He has
13 this whole spiel he's been repeating all of the time about how
14 many servers they looked at, and how -- what their efforts were
15 to look for the stolen documents. And they didn't find
16 anything. He's going to tell that story to the jury.

17 That has been withheld from us as privileged. And we
18 can't test that, number one.

19 Number two, our argument was: That opens the door for us
20 to -- to test that, and to counter that.

21 And I just think that ties in.

22 The only reason I'm mentioning it now: It was argued
23 before. I don't know that it's been fully resolved. And I
24 just --

25 **THE COURT:** Okay. You raise a good point.

1 If you are saying that you did these searches on the
2 servers for certain key words, but you had refused to allow
3 those people who did the searches to be deposed, then that is a
4 problem.

5 **MR. GONZÁLEZ:** Hold on.

6 **THE COURT:** All right.

7 **MR. GONZÁLEZ:** I'm still waiting to hear the claim of
8 privilege that he's talking about.

9 There are three things.

10 One, their inspection.

11 Two, we fired Levandowski.

12 And, number three, our expert used certain search terms,
13 including search terms that they gave us, and ran those terms.

14 Those are the three things.

15 **THE COURT:** Who? What expert?

16 **MR. GONZÁLEZ:** I don't remember the experts.

17 **THE COURT:** Is it one of your designated experts?

18 **MR. GONZÁLEZ:** It's one of our designated experts,

19 Your Honor.

20 **THE COURT:** Was that expert deposed?

21 **MR. GONZÁLEZ:** He's going to be deposed, and he's
22 going to testify.

23 There's no --

24 I'm still waiting to hear what the claim of privilege is.

25 **THE COURT:** Well, what is the claim of privilege?

1 **MR. VERHOEVEN:** They've claimed privilege over all of
2 their investigation, Your Honor.

3 In fact, the person they've designated to do trial,
4 although we haven't deposed her yet, is an attorney who's going
5 to testify about this inspection they've done.

6 And as to the -- the non-cooperation argument that they're
7 going to make about Mr. Levandowski, they've repeatedly
8 instructed the witnesses not to answer on that subject, on the
9 ground of attorney-client privilege.

10 **THE COURT:** This is -- you're trying to hijack the
11 whole hearing.

12 **MR. VERHOEVEN:** I'm sorry. I just --

13 **THE COURT:** Go have a seat.

14 **MR. VERHOEVEN:** Okay. It's just related to that --

15 **THE COURT:** This is premature. The guy hasn't even
16 been deposed yet.

17 **MR. VERHOEVEN:** Okay.

18 **THE COURT:** All right. Okay.

19 **MS. DEARBORN:** Yeah. There's a motion *in limine*
20 pending on this Your Honor. That's Motion *in Limine* Number 14.

21 **THE COURT:** I'm sorry. Pending on what?

22 **MS. DEARBORN:** On the issue that we were just
23 discussing.

24 **THE COURT:** Number 14?

25 **MS. DEARBORN:** Yes.

1 **THE COURT:** Whose motion?

2 **MS. DEARBORN:** I believe that is -- it's Waymo's
3 motion.

4 **MS. DUNN:** Waymo brought a motion to exclude our
5 argument -- Uber's argument -- that Levandowski has not
6 cooperated with our investigation. And so that --
7 Mr. Verhoeven was trying to inject that in the last
8 conversation; but if that needs to be argued, we can certainly
9 argue it.

10 **THE COURT:** All right. Number 14 is Waymo wants to
11 preclude defendants from arguing that Levandowski has not
12 cooperated with defendants in this action, on the basis,
13 according to Waymo, that Levandowski clearly has cooperated,
14 although only when it serves him to do so.

15 All right. So let's go ahead and hear this motion.

16 **MR. PERLSON:** Good morning, Your Honor.

17 So the issue here is pretty simple. One of the things
18 that they want to present and tell the jury is that
19 Mr. Levandowski would not cooperate with them in this
20 litigation.

21 I think this relates to their efforts in, you know,
22 complying with the Court's Orders, or lack thereof, and that
23 sort of thing.

24 And this is one of the areas where we've, you know,
25 sought -- that they haven't produced documents, and refused to

1 produce them based on privilege.

2 And even at Mr. Levandowski's deposition, when -- I think
3 that his deposition is sort of emblematic of the problem we
4 have here. In his deposition Ms. Dunn asked him -- asked
5 Mr. Levandowski, *But you would not cooperate with Uber's*
6 *investigation in this case?*

7 And he pled the Fifth, as he did to most of the questions
8 in his deposition.

9 And then I asked -- on redirect I tried to challenge that,
10 and tried to make my own record. And I asked, *Was there*
11 *anything that Uber's lawyers asked you to do in relation to*
12 *Uber's investigation in relation to this litigation that you*
13 *actually did?*

14 And he was -- he pled the Fifth.

15 And then I asked him again. I said -- another time I
16 asked him whether -- was there anything that he refused to do.

17 And there was instruction not to answer.

18 And --

19 **THE COURT:** Well, did he plead the Fifth, anyway?

20 **MR. PERLSON:** Well, I don't think he answered,
21 because the pled the Fifth. And --

22 **THE COURT:** Well, you don't think, or you know he
23 didn't answer?

24 **MR. PERLSON:** Huh?

25 **THE COURT:** Did he --

1 **MR. PERLSON:** He wouldn't have answered it, anyway.
2 I think he would have pled the Fifth either way; but they
3 instructed him not to answer; but what -- but what I'm --

4 **THE COURT:** Well, what is your point?

5 **MR. PERLSON:** But the point is, Your Honor, is
6 that -- and I think we'll see it more at Ms. Padilla's
7 deposition, which is next week. When we're going to be asking
8 questions that challenge the assertion that Uber's making that
9 Mr. Levandowski did not cooperate, they are going to preclude
10 us from asking questions challenging that.

11 So, for example, they're going to say they sent a couple
12 letters to Mr. Levandowski where they said, *Please cooperate.*
13 *Now you're not cooperating.*

14 And then when we want to get discovery into what he
15 actually did discuss with the lawyers before that time, they've
16 refused to produce that discovery to us in document form.
17 They've withheld it as privileged, and they have not allowed us
18 to explore that with their witnesses.

19 So what I fully expect at the deposition coming up --

20 **MR. VERHOEVEN:** Just to augment, Your Honor, here's
21 an example. I took the deposition of Mr. Kalanick. And he was
22 involved in decisions with respect to what to do with
23 Mr. Levandowski after these Complaints were filed. And every
24 time I asked him about anything that -- where a lawyer was in
25 the room, which was almost 100 percent of the time, the

1 witness, Mr. Kalanick -- excuse me -- Mr. Kalanick was
2 instructed not to answer. And so I have no discovery about
3 their claim that he didn't cooperate.

4 **THE COURT:** All right.

5 **MS. DUNN:** Your Honor, I say that most of that is
6 incorrect.

7 First of all, the fact that Mr. Levandowski didn't
8 cooperate, which is all this MIL is about, is fairly evident
9 from the fact that he is taking the Fifth, and that he was
10 fired for noncooperation; a letter that has been in the public
11 record on this case for a long time.

12 What Mr. Perlson is talking about are questions that
13 specifically ask a witness, *What did you communicate to*
14 *lawyers? And what did lawyers communicate to you?*

15 And in that circumstance, it's proper to instruct that to
16 the extent the question asks for privileged information, that
17 the witness should not disclose that privileged information,
18 which was the instruction.

19 I think what is happening here is that counsel is trying
20 to shoehorn into an MIL --

21 This is about a simple thing: Whether Uber is able to
22 argue that Mr. Levandowski didn't cooperate with Uber, which I
23 am surprised at this point is even controversial, since it's so
24 evident that he did not, and that that was the reason -- one of
25 the reasons he was terminated.

1 At a previous hearing, Your Honor even instructed the
2 parties that we ought to be able to say we went to him; said,
3 *Give us something.*

4 And he said, No.

5 And he was fired; in part, as a result.

6 So they have received documents. And I would suggest this
7 is not the place to fight future fights that will come up at
8 depositions.

9 **MS. DUNN:** And as a discovery issue, this has been
10 before Judge Corley. She reviewed the letters, and counsel
11 certainly have the document Judge Corley ordered produced.

12 **THE COURT:** Help me remember this. It seems to me
13 that before he was fired, there was an interim step where he
14 recused himself, but stayed on in his job.

15 So what was the level of cooperation in that era?

16 Which leads to the question of: Should Waymo be allowed
17 to show that there was a period of time when Levandowski was
18 allied with Uber, but you're refusing to allow discovery into
19 what the extent of that alliance was?

20 **MS. DUNN:** Your Honor, these depositions have not
21 happened yet.

22 The deposition Mr. Verhoeven is talking about came out
23 before the Stroz Report.

24 These are privilege issues that may or may not come up at
25 depositions in the future.

1 The only thing before Your Honor today -- and I think --

2 **THE COURT:** How come you haven't done this before
3 now? The depositions.

4 **MS. DUNN:** Well, I think that --

5 **MR. VERHOEVEN:** The parties agreed to put off some
6 depositions -- just a few -- because we wanted to be efficient.
7 And we were waiting for the ruling on the Stroz Report. So
8 Ms. Padilla was one of those. Your Honor, she's scheduled up.
9 We're going to do it.

10 **THE COURT:** Why wasn't she deposed last week, after
11 the Stroz Report was produced? Why are we waiting until after
12 the pretrial conference to take her deposition?

13 **MR. PERLSON:** Well, Your Honor, we're taking a series
14 of depositions this week because we're trying to evaluate and
15 get the material. Your Honor, we're still -- as Ms. Baily
16 pointed out, we're still getting documents from Uber; internal
17 documents that came off their privileged log. We can't take
18 those depositions with -- of the people if we don't have their
19 documents.

20 **THE COURT:** Mr. González said that you're
21 exaggerating; that you've already got all of the documents;
22 that these are now different copies of the same documents -- I
23 think that's what he said -- and that you're exaggerating.

24 I don't know who to believe anymore in this case.

25 **MR. PERLSON:** Well, Your Honor --

1 **MR. VERHOEVEN:** If I can go back to the motion or to
2 this issue, Your Honor, you heard counsel say we asked him to
3 cooperate. He said no.

4 We have no discovery on that. When we ask about that, we
5 get an instruction.

6 And the only discovery I've got, Your Honor, was from
7 Mr. Gurley; a director. And he's from Benchmark. He's a
8 director -- or was at the relevant time a director at Uber.
9 And he testified that repeatedly he recommended that
10 Mr. Levandowski be fired, at Board meetings.

11 And Mr. Kalanick refused, and fought and fought and
12 fought.

13 So we need -- if they're going to start making an argument
14 that they're -- they're clean, and they never cooperated with
15 this, or he never cooperated with them, and they never stood
16 behind him, and they never ratified his conduct, then we
17 should -- either that should be precluded, or we should get
18 discovery into that.

19 **MS. DUNN:** Your Honor, I hate to tell you that
20 Mr. Gurley's deposition testimony is now being entirely
21 misrepresented to you. So that just did not -- that was not
22 said.

23 **THE COURT:** All right. Thank you. Enough on
24 Number 14.

25 All right. Let's go to one that's probably easier for me

1 to understand: Number 16, about the earrings. This is a Waymo
2 argument. What's the story there?

3 Give me your name again, please.

4 **MS. ROBERTS:** Andrea Roberts.

5 **THE COURT:** All right. What do you want to say
6 there?

7 **MS. ROBERTS:** Your Honor, I think this one is a
8 pretty straightforward story of discovery being withheld and
9 not produced to us as it should have been earlier in discovery.

10 There was a set of earrings. They're actual earrings in
11 the shape of boards that Mr. Chatterjee brought out at a
12 deposition of a Waymo witness on August 22nd. That was two
13 days before the close of fact discovery.

14 The earrings had not been disclosed to us prior to that.
15 Their existence had not been disclosed in any interrogatories,
16 any documents, anything of the sort.

17 **THE COURT:** How about Rule 26?

18 **MS. ROBERTS:** Sorry?

19 **THE COURT:** Rule 26 Initial Disclosures.

20 **MS. ROBERTS:** No. No indication of any earrings
21 specifically.

22 **THE COURT:** Had there been a request for production
23 of materials, that would have covered the earrings?

24 **MS. ROBERTS:** Your Honor, we have -- we had an
25 Interrogatory Number 6, which, based on the theory that we

1 think that they're going to rely on these earrings for, they --
2 they would have been responsive to that. That interrogatory
3 asks for identification of each trade secret Otto Trucking
4 contends is not subject to efforts that are reasonable to
5 maintain its secrecy.

6 So if they're going to argue that these earrings are
7 evidence that Waymo did not take reasonable efforts to maintain
8 the secrecy of its trade secrets, they should have been
9 disclosed in response to Interrogatory Number 6.

10 And we also had document requests to Mr. Levandowski,
11 which was Request Number 32, and the subpoenas for
12 Mr. Levandowski. And the text messages that were produced by
13 Mr. Levandowski on August 24th, the very last day of discovery,
14 would have been responsive to that request.

15 And just to remind Your Honor, those text messages were
16 between Mr. Levandowski and Seval Oz. In late July
17 Mr. Levandowski reached out to Ms. Oz to ask for these
18 earrings. And it appears that he received them from Ms. Oz in
19 late July.

20 And yet -- and then we didn't hear about them, at all,
21 until August 22nd. By that time it was two days until the
22 close of fact discovery. So we've had no opportunity to take a
23 deposition or learn anything further about these earrings,
24 other than Mr. Chatterjee's own direct-examination questions at
25 deposition.

1 **THE COURT:** All right. Mr. Chatterjee.

2 **MR. CHATTERJEE:** Your Honor, these earrings came from
3 a third party, Seval Oz, who left Waymo a number of years ago.
4 She has been on the Initial Disclosures as a person who would
5 have relevant factual knowledge since the very beginning. And
6 we -- even when we narrowed the Initial Disclosures lists, we
7 kept her on the list. And we said, *If you want to get*
8 *documents from her, you'd need to subpoena her directly.*

9 She actually works on Google's facilities today. And her
10 company has Google investment. Google is an investor in their
11 company. They certainly have had access to her.

12 We came into possession of them the day before
13 Pierre Droz's deposition, and we used them.

14 Now, in interrogatory responses we did say that people
15 have kept mementos of Waymo devices throughout. So we -- and
16 that certainly has been an issue in discovery. It's come up
17 repeatedly in depositions.

18 **THE COURT:** When did you receive -- not you,
19 personally, but your law firm or any defense law firm --
20 receive these earrings?

21 **MR. CHATTERJEE:** The earrings came into our
22 possession the day before Mr. Droz's deposition. And we
23 gave --

24 **THE COURT:** The day before who?

25 **MR. CHATTERJEE:** Mr. Droz's deposition.

1 It was used the following day. It was made available to
2 Waymo. We gave them pictures of it. And we offered to them to
3 let them inspect it. And they could have also sought Ms. Oz's
4 deposition.

5 And they've done nothing. They've never come and
6 inspected it in the weeks that have followed. They have never
7 tried to secure Ms. Oz's testimony.

8 **THE COURT:** Ms. Cooper says that you got them in
9 July.

10 **MR. CHATTERJEE:** I did not.

11 I think the text messages show that Mr. Levandowski was
12 texting with her. And I think it was something like he got
13 some of the boards. And then he later on got the clips,
14 because the clips weren't attached. That's what the text
15 messages say.

16 **MS. ROBERTS:** So Your Honor --

17 **THE COURT:** All right. So the fact that Levandowski
18 gets them -- he's not a party in the case. So I don't -- what
19 is your point?

20 **MS. ROBERTS:** Well, so what I think -- I think
21 Mr. Chatterjee's being kind of clever in saying that he got
22 possession of the earrings the day before the deposition.

23 What he has not indicated is when Otto Trucking learned
24 about the existence of these earrings. Mr. Levandowski is a
25 part of Otto Trucking. It certainly would seem that he -- he

1 procured this evidence from a third party.

2 We had -- while -- although she was identified on Initial
3 Disclosures, there had been no other form of discovery
4 responses that clued us into what it was that they're intending
5 on Ms. Oz to testify about; that these earrings existed.

6 But back to Mr. Levandowski, he clearly received them at
7 the end of July. There's been no dispute about that.

8 Somehow Mr. Chatterjee got them the day before.
9 Otto Trucking's not telling you when they became aware of those
10 earrings; and they did not disclose them to us prior to
11 deposition.

12 **THE COURT:** All right. When did you become aware of
13 the earrings? Just answer that question.

14 **MR. CHATTERJEE:** Your Honor, I was aware that the
15 earrings may exist. I don't know the exact date. It was for
16 some time. And I -- but I -- I had not been able to locate
17 where they were.

18 We also submitted a declaration from Daniel Gruver in
19 opposition to this motion that outlines how Waymo, themselves,
20 knew about it, and people at Waymo knew about it.

21 And when we asked them to identify about any public
22 disclosures, they never identified it in their discovery
23 responses.

24 **MS. ROBERTS:** So, Your Honor, the Declaration of
25 Mr. Gruver does not say that Waymo knew about this. It says

1 that Mr. Gruver had a conversation with Ms. Oz about these
2 earrings years ago, when she still worked at Google -- what was
3 Google at the time.

4 **THE COURT:** I thought she was at Google now.

5 **MS. ROBERTS:** She's a former employee, Your Honor.

6 **THE COURT:** Where is she now?

7 **MR. CHATTERJEE:** So, Your Honor, she is the CEO of a
8 company, I believe, called "Aurima Technologies." And it
9 actually operates out of Google's facilities.

10 **THE COURT:** Is she a Google employee?

11 **MR. CHATTERJEE:** No.

12 **THE COURT:** All right. So she's not.

13 Okay. That's enough on Number 16. We've got to keep
14 moving along.

15 All right. Number 13, about David Drummond. Help me
16 understand this a little better. And this is a motion by
17 Waymo.

18 **MS. L. COOPER:** Thank you, Your Honor. This --

19 **THE COURT:** Your name?

20 **MS. L. COOPER:** Lindsay Cooper.

21 **THE COURT:** Who is that? Weren't you just up here?
22 Who was that, that was just arguing?

23 **MS. L. COOPER:** That was Andrea Roberts.

24 **THE COURT:** Who?

25 **MS. L. COOPER:** Andrea Roberts.

1 **THE COURT:** You didn't put Andrea Roberts on this
2 list, Angie.

3 **THE CLERK:** She wasn't here.

4 **THE COURT:** Did Ms. Roberts just come in late or
5 something?

6 **MS. ROBERTS:** No, Your Honor. I checked in.

7 **THE COURT:** All right. Well, you weren't on my list.
8 And I apologize for getting my name on wrong.

9 You're Ms. Cooper?

10 **MS. L. COOPER:** Yes.

11 **THE COURT:** All right. Go ahead, please.

12 **MS. L. COOPER:** So with this motion we are -- it's
13 very limited in scope. As we said in our Opening Brief, we're
14 not challenging the defendants' ability to introduce evidence
15 that Mr. Drummond sat on the Board, that he resigned from the
16 Board, or even his reasons for resigning from the Board.

17 **THE COURT:** Which board? The Uber Board?

18 **MS. L. COOPER:** Yes. Mr. Drummond is a very senior
19 executive at Alphabet; Chief Legal Officer. He sat on Uber's
20 Board from between 2013 and 2016.

21 We also don't dispute that the parties are competitors,
22 and that probably the cooperation between the parties in the
23 future will grow.

24 What we're trying to exclude is to prevent defendants from
25 taking the next step, and implying that Mr. Drummond did

1 something improper by continuing to sit on Uber's Board through
2 a time when the companies were moving from a partnership to
3 what I would call sort of a "break-up." And in this time,
4 quite a few things happened. Anthony Levandowski stole the
5 files. He left Google. Uber acquired Anthony Levandowski's
6 company.

7 **THE COURT:** How much of that did Drummond know?

8 **MS. L. COOPER:** So Drummond was closed out from Uber
9 Board meetings for two years before he resigned. He resigned
10 August 2016. So he was shut out from all Uber Board meetings.
11 And I don't think there's any dispute about that, but what we
12 don't want to do --

13 **THE COURT:** Wait. Somebody is hacking and coughing.
14 Would you like a cough drop?

15 **MR. CHATTERJEE:** I'll get one, Your Honor.

16 **THE COURT:** Please get one, because it's just like a
17 thunder -- a static crash. And you can't do that to your
18 opposing counsel. She deserves the full attention of the
19 Court. And when you're hacking and coughing, I can't hear what
20 she's saying. All right?

21 Start over, please, with the last sentence. I want to
22 hear what you're saying. He was closed out of the -- what? I
23 didn't hear, because Mr. Chatterjee was coughing.

24 **MS. L. COOPER:** So he was closed out from Uber Board
25 meetings, so he didn't have access to Uber Confidential

1 Information. He didn't have access to Uber's current plans
2 with ride-sharing during that time.

3 What we're trying to avoid with this motion, however, is
4 an insinuation from defendants that Mr. Drummond acted
5 improperly; that he breached ethical duties to the Uber Board;
6 he breached fiduciary duties and, you know, was sitting on the
7 Board to collect competitive intelligence for Waymo. That's
8 not true, at all.

9 But to go through the entire story, and to explain how he
10 was shut out, you know; how the shut-out worked in practice;
11 whether it was effective; how long it lasted -- that -- it's
12 going to be a huge waste of time.

13 **THE COURT:** Okay. Thank you. Hang on a minute.

14 What do you say to that?

15 First of all, what is your offer of proof as to why
16 Drummond has anything to do with our case?

17 **MS. JOSEPHS:** Halley Josephs, with Susman Godfrey,
18 for Uber.

19 **THE COURT:** Got you. You are on the list. Okay.
20 Thank you.

21 **MS. JOSEPHS:** So you asked what Drummond has to do --

22 **THE COURT:** Yeah. What is your offer of proof of why
23 this has got anything to do with our case?

24 **MS. JOSEPHS:** Sure. Well, Mr. Drummond maintained a
25 relationship with Mr. Kalanick and other Uber executives from

1 2013 to 2016. And Ms. Cooper is insinuating what we may or may
2 not argue as far as the story, but we think there are two sides
3 to every relationship. Whether or not Mr. Drummond attended
4 Board meetings or was not permitted to attend Board meetings
5 for a certain period of time doesn't change the fact that he
6 was still a Board member. He had this relationship. Google
7 and Waymo misled Uber about their competitive intentions with
8 Uber, and about the overall nature of what Uber thought was a
9 partnership for quite some time.

10 So we think --

11 **THE COURT:** What do you mean, a partnership? You're
12 saying Waymo and Uber had a partnership?

13 **MS. JOSEPHS:** There were discussions, Your Honor.
14 And these are the exhibits to our Opposition Brief that show
15 the parties had ongoing discussions about ways they could
16 potentially partner, although, unbeknownst to Uber, as early as
17 2013 Google had already decided it was interested in entering
18 the transportation-as-a-service market; and by -- I believe
19 it's November 2014 -- had already decided that it was going to
20 compete with Uber; that it was not going to partner.

21 None of this information was made public to us. And
22 communications between the two parties suggests that that
23 partnership was possible.

24 **THE COURT:** How would that excuse stealing away
25 Mr. Levandowski and all of his team? I don't get it.

1 How could that -- how could Drummond possibly help Uber in
2 this case?

3 **MS. JOSEPHS:** Well, Mr. Drummond's misleading of Uber
4 and his failure to, you know, pick up the phone and tell
5 Mr. Kalanick about the concerns that Waymo had --

6 **THE COURT:** About what? What concerns did Waymo
7 have?

8 **MS. JOSEPHS:** Well, just as an example, Your Honor,
9 the same day that Mr. Drummond submitted his resignation letter
10 to Mr. Kalanick, there's an e-mail. And it's Exhibit 2 to --
11 to Waymo's Motion in Limine Number 15. There's some crossover
12 with that one. And in that exhibit there's an e-mail where --
13 a recounting that Mr. Drummond had directed the forensic
14 investigation to pick up the pace directly as a result of the
15 Otto acquisition being announced. And --

16 **THE COURT:** He did what?

17 **MS. JOSEPHS:** So the same day --

18 Well, let me back up for a minute, Your Honor, to be
19 clear. So we believe the case law shows that all of this
20 information is relevant to Waymo's motives for filing suit.

21 Judge Corley has already said that's a relevant argument.
22 It's relevant to bad faith, which we've asserted in our Answer.
23 It's relevant to witness-credibility issues, as well as
24 damages-related issues.

25 So we think this is about attorney argument. Waymo's not

1 trying to exclude any of this evidence. They just don't like
2 what we're trying to --

3 **THE COURT:** I don't see how Drummond possibly -- did
4 he know? Did he have information about the acquisition of
5 Levandowski and his team?

6 **MS. JOSEPHS:** I don't believe so, Your Honor; but I
7 don't think that's the only -- I don't think that's the only
8 argument that one can draw from these facts.

9 I think for bad faith, for modus for filing suit, for
10 witness credibility, and damages, it doesn't -- it's not all
11 based on whether he had access to our Confidential Information.
12 It's about the overall relationship/partnership.

13 **THE COURT:** All right. Anything more on your side?

14 **MS. L. COOPER:** Yes, Your Honor.

15 I disagree with almost all of the factual
16 characterizations there. The evidence shows that Google was
17 really up front about its plans to go into the ride-share
18 industry.

19 In its Opposition, Uber admits that it knew about Uber --
20 about Waymo trying to go into the ride-sharing industry as
21 early as 2014. Again, in 2015, Travis Kalanick and Larry Page
22 sat down, and Larry Page confirmed Google is going into the
23 ride-sharing industry; but the import of that conversation is,
24 you know, Google was actually worried about Uber competing with
25 it, because Uber was aggressively entering the

1 self-driving-car-technology field, which had traditionally been
2 Google's.

3 In any event, we're not trying to exclude any of that
4 evidence. The history between the parties and how we got to
5 this lawsuit, I understand, is the subject of another motion *in*
6 *limine*; but pending ruling on that -- we're not trying to
7 exclude those facts.

8 What we're trying to prevent is them from taking the next
9 step, which is to insinuate, as they did during Mr. Drummond's
10 deposition, that Mr. Drummond owed a fiduciary duty to Uber,
11 and should have told them specifically about all of Google's
12 plans. And that's just not true that they've never made that
13 claim outside of this litigation. And, you know, Google,
14 Alphabet, Mr. Drummond --

15 **THE COURT:** All right. All right. Are you arguing
16 Number 15, as well?

17 **MS. L. COOPER:** Mr. Eiseman is.

18 **THE COURT:** Okay. We're going to go to that one now.

19 **MS. JOSEPHS:** Thank you, Your Honor.

20 **MR. EISEMAN:** Good morning, Your Honor.

21 David Eiseman, on behalf of Waymo.

22 Two issues. Two components to our motion, MIL 15. One is
23 that we think that the defendants should be precluded from
24 saying that this lawsuit is somehow an attempt to slow down
25 Uber as a competitor. That's number one.

1 And, number two, they shouldn't be able to introduce
2 evidence or argument that Waymo should have included
3 Mr. Levandowski as a party in the lawsuit.

4 I think that -- let me take the second one first, because
5 I think that's easy. Your Honor has already ruled in -- during
6 a hearing earlier that we didn't have an option to include
7 Mr. Levandowski in this lawsuit because of the Arbitration
8 Agreement, and that it was proper for us to proceed against
9 Uber here and the other defendants, and to pursue
10 Mr. Levandowski in arbitration.

11 So for them to -- for the defendants --

12 **THE COURT:** What do you think we should tell the jury
13 on that point? Don't you think the jury's going to wonder:
14 Where is Levandowski?

15 **MR. EISEMAN:** Well, they may, but they shouldn't be
16 able to point at an empty chair; kind of make an empty-chair
17 kind of argument here that somehow we are singling out Uber to
18 try to stop them from competing, and what we really should have
19 done is to sue Mr. Levandowski, because we have sued
20 Mr. Levandowski; it's just in a separate proceeding.

21 And so the two issues sort of come together, in that
22 they're arguing or trying to argue that somehow this lawsuit's
23 not motivated by a good-faith effort to enforce Waymo's trade
24 secrets. We, of course, dispute that. We think this argument
25 or this lawsuit's in perfectly good faith, and that, yeah,

1 there's competition between the two companies, but this is not
2 some sort of effort to wrongfully compete against Uber.

3 And, you know, I heard Ms. Josephs stand up earlier and
4 say that they pleaded bad faith in their Answer. I don't
5 believe that they've pleaded bad faith in their Answer. There
6 is an unclean-hands defense in Otto Trucking's Answer, but Uber
7 and Ottomotto have not pleaded any kind of unclean-hands
8 defense, to my knowledge. That's number one.

9 And then number two is that they haven't asserted an
10 unfair-competition claim in this case. And that's when
11 motivations for filing lawsuits get into evidence, is when
12 there's an unfair-competition claim. And we don't have that
13 here.

14 **THE COURT:** Okay. What does Uber say?

15 **MS. DUNN:** Thank you, Your Honor.

16 Your Honor, first of all, just to be clear about what this
17 motion is trying exclude, it is -- this is relevant to Uber's
18 entire defense in this case.

19 So Waymo is saying that they brought this case because
20 14,000 files were downloaded from their server. And their
21 motion here is the flip side of what happened when they did not
22 want to disclose to us the documents discussed earlier, where
23 the early forensics investigation showed that these were
24 low-value documents, and that no alarm bells were ringing.

25 The documents are the same. These are the documents with

1 the lawyers discussing that there is management concern about
2 this, and discussing that they are concerned
3 Anthony Levandowski is going to start a competitive venture.

4 This is all tied together with their forensic analysis in
5 the first instance that showed that there was not the concern
6 that motivated this. There are e-mails where internally at
7 Google they are saying that they are thinking about taking
8 action to stop the acquisition. And this involves lawyers and
9 executives.

10 So what they are trying to do is take the references to
11 competition, which is the backdrop to the parties' relationship
12 in this case.

13 You cannot take this little piece out, without
14 understanding the relationship between these people that
15 Mr. Page has already testified to in deposition; his concerns
16 about Mr. Levandowski; that he didn't think it was a good idea
17 for him to start a competitive venture; and what Mr. Kalanick
18 has said about trying to partner with Google in the early days,
19 and thinking that Uber, having cars, and Google, having started
20 self-driving technology, would be a good match. So this is --
21 this is directly relevant to the centerpiece of their case.

22 Also, under the case law it is relevant. And this is the
23 *Carville* case. Judge Grewal applied this in *GSI*. This is
24 relevant to witness credibility; the motivation of the lawsuit.
25 It's also relevant to failure to mitigate damages. And nobody

1 can argue that those things are not in this case.

2 So they're focused on bad faith. We have included a jury
3 instruction on the jury form, on the Verdict Form -- bad
4 faith -- that we would like to present.

5 But whether or not Your Honor agrees with us -- and we
6 will argue that separately -- this is relevant both to the
7 facts that are already in this case, and it is absolutely
8 intertwined with something very important that is happening in
9 this case that they want to make sure to keep out, which is the
10 lawyer-driven and competitive nature of what drove this company
11 to say, *You know, this first investigation is not good enough.*
12 *Please go back, because we might need to act before this*
13 *acquisition closes.*

14 So they want to put on evidence of our reaction to their
15 Complaint, but they want to make sure nobody knows why they
16 filed it. And that doesn't make any sense.

17 **THE COURT:** What do you say to the Levandowski point
18 that --

19 **MS. DUNN:** Oh.

20 **THE COURT:** -- as to the empty chair, and so forth?

21 **MS. DUNN:** Well, first I want to correct something.

22 While, you know, Waymo says we didn't sue, we did sue
23 Levandowski, but they have not sued Levandowski for
24 trade-secret theft. And a brick is not a wall. But once you
25 get a number of bricks, which we now have, because of these

1 Sasha Zbrozek documents, because of the intertwined-competition
2 theme, and because they didn't sue Anthony Levandowski for
3 trade secrets anywhere, even though they clearly sued him
4 somewhere for something, just not this, it starts to resemble a
5 wall.

6 **THE COURT:** What do you mean: A wall?

7 **MS. DUNN:** Which is that there is -- this is a -- a
8 lawsuit that at least in substantial part was motivated by the
9 competitive relationships between these companies, and Google's
10 decision that they were going to compete with Uber, and not
11 partner with Uber. And it is part and parcel of the documents
12 that we've already seen that Waymo tried to keep from us.

13 But this is a very important part of the presentation of
14 this case. And if they can come in --

15 **THE COURT:** I don't understand. I asked you about
16 Levandowski, and you veered off on competition again.

17 **MS. DUNN:** I apologize.

18 **THE COURT:** They don't want the fact that -- they
19 don't want you saying, *Hey, they didn't sue Levandowski.*
20 *Levandowski is the bad guy. They should have sued him. We're*
21 *innocent.*

22 So what do you say to that?

23 **MS. DUNN:** That -- I don't see the problem with that.
24 They didn't sue him for trade-secrets theft. They've made this
25 person's conduct the centerpiece of their entire case. He's --

1 Your Honor has ruled that he might come to court, and take the
2 Fifth. So the jury is going to have questions about this. And
3 it is absolutely germane to everything that's going on here for
4 the jury to know that Mr. Levandowski has not been sued for
5 Mr. Levandowski's conduct, at all; and instead, Uber has been
6 sued, which -- you know, even though nothing has been found at
7 Uber.

8 So you have to wonder. And the jury will wonder, *Huh*.
9 *What's that about?*

10 And so, yes, we do think that that's relevant.

11 **THE COURT:** Okay.

12 **MR. EISEMAN:** Can I briefly respond, Your Honor?

13 **THE COURT:** Please respond.

14 **MR. EISEMAN:** First of all, with respect to not suing
15 Mr. Levandowski for trade-secret misappropriation, we have the
16 right to sue Uber and the other defendants in this court -- in
17 federal court -- for trade-secret misappropriation. And we
18 made the decision not to include Mr. Levandowski under that
19 claim, because we wanted to stay in federal court. There's
20 nothing improper about that. There's nothing improper about
21 enforcing our intellectual-property rights.

22 And so for them to try to turn documents relating to the
23 concerns that Waymo had and Google had about Mr. Levandowski's
24 departure into some argument that we've brought this lawsuit in
25 bad faith, when they aren't alleging an antitrust claim, some

1 sort of sham-litigation claim --

2 **THE COURT:** But you know, in every patent case --

3 This is no longer a patent case, but in every patent
4 case -- I bet I could go find ten examples where you've done
5 it, yourself -- the defendant always argues, *Hey, this is not*
6 *about patents. This is not about IP. This is simply one*
7 *competitor trying to put the other one out of business.* That
8 happens all of the time. Right?

9 **MR. EISEMAN:** But in --

10 **THE COURT:** Have you ever made that argument? I bet
11 you have.

12 **MR. EISEMAN:** No. I've --

13 **THE COURT:** So why shouldn't they get to make this
14 very argument that, *Hey, it isn't about trade secrets. This is*
15 *about trying to put Uber out of the business, so you and Lyft*
16 *can take it over?*

17 **MR. EISEMAN:** Well, because the documents they cite
18 in their motion --

19 For example, Exhibit 37 is an e-mail recounting a
20 conversation that Mr. Page had, where he expressed concern; but
21 the concern that was expressed was that Mr. Levandowski was
22 leaving Waymo, and soliciting employees from Waymo.

23 And that's a legitimate concern. That's not some sort of
24 anticompetitive purpose. So that it's true that in general in
25 cases like this, Your Honor, that people talk about fierce

1 competition. And we're not suggesting that both sides won't do
2 that in this case; but they shouldn't be allowed to use
3 documents out of context. It's a classic 403, where we're
4 going to end up litigating a bunch of side issues.

5 **THE COURT:** Well, maybe there's some specific
6 documents where I could say, *Yeah, that's too far. And that's*
7 *misuse*; but just on general-themes point --

8 **MR. EISEMAN:** Well, Your Honor --

9 **THE COURT:** -- I'm having some trouble with your
10 point.

11 **MR. EISEMAN:** If Your Honor's taking this under
12 submission -- and it sounds like you are -- we'd ask you to
13 look at Exhibit 37 and Exhibit 43.

14 **THE COURT:** Wait a minute. Let me write those down.
15 Exhibit 37 and 43. Okay.

16 **MR. EISEMAN:** And we'd ask you to look at those --
17 they're attached to the opposition; the defendants' opposition
18 to our motion -- because those are the kinds of documents we're
19 concerned about.

20 And then lastly, Your Honor, on the -- again, going back
21 to the empty-chair argument that we feel very strongly about,
22 for the reasons we've put in our papers and for the reasons
23 we've mentioned. And we'd ask you to not let them make that
24 argument, because we have a legitimate reason --

25 **THE COURT:** Are you going to make the empty-chair

1 argument? If you are, I think you would wind up regretting it,
2 because I would interrupt, and say to the jury, *Okay.*

3 *Mr. Levandowski is not here. That's true. He's not a*
4 *defendant. However, they have the right to sue Uber for*
5 *whatever wrongs it did, if any. And if you find, ladies and*
6 *gentlemen of the jury, that Uber did something wrong, then*
7 *they're liable for that, even if Levandowski would also be*
8 *liable for that. And this argument about the empty chair is*
9 *bogus.* Then I will spell it. B-o-g-u-s.

10 So I have a feeling I'm putting you on notice I would not
11 allow that argument.

12 **MS. DUNN:** We have heard you.

13 **THE COURT:** If you even go close to it, I would
14 interrupt. Without further consultation, I would tell the jury
15 just what I said. So that part, I agree with you on, but --
16 but --

17 **MR. GONZÁLEZ:** Your Honor, on the empty chair --

18 **THE COURT:** No. You're not going to get to do this,
19 Mr. González. That would just be a litigation trick.

20 **MR. GONZÁLEZ:** No, no. No. This not a trick.

21 If they, in their Opening Statement, spend two hours
22 talking about Anthony Levandowski, I assume we can say,
23 *Anthony Levandowski is not the defendant here. Uber is.*

24 **THE COURT:** Of course, you can say that.

25 **MR. GONZÁLEZ:** Okay.

1 **THE COURT:** What you can say is --

2 You can't imply that they don't have the right to sue you.

3 What you can say is that you're the defendant, and they've
4 got to prove the case again you.

5 **MR. GONZÁLEZ:** Exactly.

6 **MS. DUNN:** Right.

7 **THE COURT:** That's fair. You can say that.

8 **MS. DUNN:** Your Honor, as to the first point --

9 **THE COURT:** But I want to come back. We've got to
10 tell the jury something about Levandowski and his role. They
11 will be bothered about this from the very get-go. And I deal
12 with juries all of the time, and I know how they think. They
13 are going to --

14 I'm going to tell them something. If you-all lawyers
15 don't give me help, I'm going to make up my own instruction.
16 And I'll just tell them *sua sponte* that there's another
17 arbitration going against Levandowski. So if you don't come up
18 with something cogent to tell them, I'm going to do it on my
19 own.

20 **MR. EISEMAN:** We'll work with opposing counsel to
21 come up with an instruction.

22 **THE COURT:** All right. Please do. All right.

23 **MS. DUNN:** Your Honor, just on the first point, very
24 quickly, the documents are attached to our motion, but this is
25 what we're talking about: Their meeting notes from August of

1 2016, where it says Uber is generally considered to be
2 Chauffeur's main competitor, which contradicts what they
3 learned from Anthony, with his intent to not be in the same
4 space and compete against Google.

5 **THE COURT:** Whose is this? Is this a Waymo document?

6 **MS. DUNN:** Waymo meeting notes from August of 2016.

7 It goes on to say, *If Google were to take actions on*
8 *preventing the acquisition, we need to move as quickly as*
9 *possible. Look at prior to Anthony's departure and course of*
10 *his employment whether or not they took with them Confidential*
11 *Information or trade secrets of the business. Timing here is*
12 *important, since we have to decide whether we need to take some*
13 *action before the Transaction closes.*

14 Okay? So --

15 **THE COURT:** Okay. So, so what?

16 **MS. DUNN:** So the point is that their investigation
17 into Anthony was tied and in the same documents as their
18 discussion of competing with Uber, and wanting to prevent the
19 acquisition, which is a rather major point.

20 **MR. EISEMAN:** But Your Honor, in fact, the
21 acquisition went forward. And it closed. And Google and Waymo
22 didn't take the action that is suggested in this memo.

23 **THE COURT:** Well, I know. I'm not --

24 When we get to the issue of the mitigation thing, I am
25 leaning against Uber on that, and in your favor on that.

1 I think that, however, this -- what I just heard, though,
2 is relevant to something else. It's not just --

3 You know, just because you might win on mitigation of
4 damages, that e-mail would tend to show that Waymo felt some --
5 knew that if they were going to try to block the acquisition,
6 they ought to be looking into where these trade secrets --

7 And a jury might conclude from the time that it took, even
8 though it might not be enough to knock out the case as a matter
9 of law -- but from the time it took you to eventually get your
10 act together and bring a lawsuit, that maybe Sasha was correct,
11 and these were low-grade trade secrets, and that that was the
12 -- so that it reflects on the --

13 In other words, if these were the Crown Jewels, you would
14 have been in court the next day; but since they weren't the
15 Crown Jewels and they were low-grade, it took a long time to
16 get this lawsuit together.

17 Now, I'm not saying I buy the argument. I'm just saying a
18 reasonable jury could buy the argument, based on what I just
19 heard.

20 **MR. EISEMAN:** Your Honor, obviously, we disagree with
21 the concept that any --

22 **THE COURT:** This is just a jury argument they can
23 make.

24 **MR. EISEMAN:** It would be a jury argument that they
25 could make if they had an antitrust sham-litigation claim, or

1 some sort of unfair-competition claim.

2 But the fact is this is an affirmative trade-secret claim
3 we're bringing. And it's just --

4 **THE COURT:** It's same as the patent cases. They want
5 to say, *This is just one competitor trying to stymie the next*
6 *competitor*. That's a fair argument. They make it in every one
7 of these patent cases. I know you've made that argument. I
8 could go back and find it. So I think that's okay. You can
9 make the argument: Just trying to stamp out competition.
10 That's okay. You're going to have to suffer that -- that
11 thing.

12 And on Levandowski, they cannot make the empty-chair
13 argument. That's clear.

14 But we have to explain. Levandowski's name's going to be
15 all over this case. We have to explain that he is being sued
16 in some arbitration. And you lawyers figure out how to word
17 that.

18 **MR. EISEMAN:** We will, Your Honor. Thank you.

19 **MS. DUNN:** Thank you, Your Honor.

20 **THE COURT:** All right. Hang on a minute.

21 We're not even halfway through this hearing.

22 So okay. While we're on that subject, Motion *in Limine*
23 Number 1, Waymo wants to preclude defendants from presenting
24 their bonus theory about 14,000.

25 Now, can I just give you my main concern?

1 I don't quite see how any of what you have come up with
2 gets admitted into evidence, because --

3 I'm talking now to Uber.

4 -- because it's hearsay. So how do you get around the
5 fact that Kalanick is willing to come in and say that
6 Levandowski told him? This is Hearsay 101. So I don't see how
7 you get around that.

8 **MS. DEARBORN:** Well, so, Your Honor, this -- this is
9 a fundamental point for this motion, which is that we accept
10 Your Honor's -- although we disagree with it, we accept Your
11 Honor's ruling that the March 29th, 2017, conversation between
12 Mr. Levandowski and Mr. Kalanick is excluded from evidence.
13 That is not what this motion is about.

14 This motion is about Uber's other evidence; other
15 nonprivileged evidence.

16 **THE COURT:** Good. Give me one admissible piece of
17 evidence that would support the theory that he did this for
18 bonus reasons.

19 **MS. DEARBORN:** So the timing of Mr. Levandowski's
20 downloads in relation to the timing of his bonus payments is
21 one.

22 The structure of the Chauffeur Bonus Plan, which created
23 perverse incentives, is another.

24 The structure of the Bonus Plan that created incentives
25 for Google to undervalue the project -- Project Chauffeur -- is

1 another.

2 Testimony from Google's witnesses that they were -- that
3 they were nervous about receiving their bonus payments in
4 December of 2015; that negotiations were contentious; that they
5 were being conducted by people with -- with no -- with poor
6 communication between the parties; that -- or between --
7 between the members of the team and those who were conducting
8 the negotiation.

9 All of that is circumstantial evidence, Your Honor. We
10 acknowledge that.

11 But there is no privilege issue here, and there's no
12 hearsay issue here.

13 There -- these are -- it is circumstantial evidence that
14 the timing of -- that the timing of all of this lines up.

15 And, Your Honor, I want to be very clear. Waymo is going
16 to marshal its own circumstantial evidence in service of its
17 own preferred theory as to why Mr. Levandowski may have done
18 what he did. They are going to say, *Well, the timing of his*
19 *downloads lines up with meetings with Uber executives.*

20 All we ask is exactly the same opportunity: The
21 opportunity to marshal circumstantial evidence of the timing of
22 the downloads, and other evidence from Google's own files, from
23 Google's own witnesses, from our own witnesses who were there
24 at the time, to talk about the issue.

25 **THE COURT:** Let me ask you about the March

1 conversation first. What was it that he --

2 What would be the offer of proof that Kalanick would
3 testify to as to what Levandowski said?

4 **MS. DEARBORN:** If this were to come in -- oh, so he
5 would say that Mr. Levandowski told him that he downloaded the
6 files in service of his bonus, in order to protect his bonus.
7 And I can --

8 **THE COURT:** Read it to me. You said it so fast, I
9 didn't catch it all. I want you to say it slowly, and read --
10 you read it to me, actually.

11 **MS. DEARBORN:** You know, this is actually in a
12 declaration from Ms. Padilla, who --

13 And I don't want to misconstrue her words, so I'm
14 reluctant to do that without it right in front of me,
15 Your Honor, but I can pull it up.

16 **THE COURT:** Does somebody have that?
17 Was she at the deposition?

18 **MS. DEARBORN:** Was she at the deposition of
19 Mr. Kalanick?

20 **THE COURT:** Well, where does this come from?

21 **MR. VERHOEVEN:** This has been precluded already.

22 **THE COURT:** Well, wait a minute. I don't remember
23 precluding it. If I did, I'm sorry.

24 But I want to hear about the -- I want to understand it
25 again.

1 **MS. DEARBORN:** Sure. So Mr. Verhoeven is correct.
2 This has been precluded. This is testimony about what happened
3 in a March 29th, 2017, conversation between Mr. Levandowski and
4 Mr. Kalanick at which Ms. Padilla was present.

5 The -- Mr. Levandowski said that he downloaded the files,
6 having -- and it had nothing to do with his employment at Uber;
7 and instead, it had to do with his bonus.

8 **THE COURT:** Oh, this is the one where there was a
9 selective waiver?

10 **MR. VERHOEVEN:** Yes.

11 **THE COURT:** Oh, okay. I thought you --

12 **MS. DEARBORN:** It has been excluded.

13 **THE COURT:** I thought you meant I excluded it on
14 hearsay grounds.

15 **MS. DEARBORN:** No, no. This has been excluded on
16 privilege grounds.

17 **THE COURT:** This was the slick move. Now it's coming
18 back to me. Yeah. It's going to stay excluded. That was the
19 slick move, where you selectively, in my view --

20 Padilla was there. She's a lawyer. And you said, *Oh,*
21 *This helps us. So okay. We're going to --*

22 No. I stand by that ruling 100 percent.

23 **MS. DEARBORN:** And that is not the subject --

24 **THE COURT:** I thought we were talking hearsay. All
25 right. Never mind.

1 Okay. So your point is, okay, you've got other possible
2 evidence that you think would support the inference that he did
3 it for some reason. He did it protect his bonus.

4 **MR. VERHOEVEN:** Your Honor, may I respond?

5 **THE COURT:** Yes. Go ahead.

6 **MR. VERHOEVEN:** So first of all, the only evidence
7 that they had when they invented this theory was their
8 selective waiver of this conversation, which they decided to do
9 later in the case as a strategic move after they decided to
10 throw Levandowski under the bus and fire him.

11 That was precluded by both Judge Corley and Your Honor.

12 And now -- and we simply wanted to make sure that argument
13 wasn't going to be made. And it's a good thing we did, because
14 they're saying they're going to still try to make it. And
15 there's simply zero evidence beyond that precluded testimony
16 that would even get close to supporting this -- this silly
17 notion that he would download all these documents to either
18 blackmail Google, or try to show Google that he should get paid
19 more. *Here. Look at my stolen documents. I should get paid*
20 *more.* It doesn't even make any sense. There's no evidence for
21 it.

22 You asked about hearsay. And their -- their argument on
23 this is that it's a party admission; but it's their own party.
24 You can't use the party admission for yourself. You use it
25 against the other side. And clearly they're using it for the

1 truth, Your Honor.

2 Counsel talked about timing, and said timing shows
3 circumstantial evidence of this. The facts on timing are that
4 Mr. Levandowski was informed on December 5th that he would
5 receive payment; and they downloaded the files after that.

6 **THE COURT:** I'm sorry. He would receive payment of
7 what?

8 **MR. VERHOEVEN:** Of his initial bonus.

9 **THE COURT:** Wait a minute. Say that again. You mean
10 on December 5, 2015. Right?

11 **MR. VERHOEVEN:** Yes.

12 **THE COURT:** All right. 2015. December 5. There's
13 something in writing that says --

14 **MR. VERHOEVEN:** There are two -- yes. I think my
15 co-counsel is getting it; but he was informed that he was going
16 to receive the first payment. And --

17 **THE COURT:** The first payment; but wasn't he worried
18 about the later payment, allegedly?

19 **MR. VERHOEVEN:** There's no evidence of that. Zero.

20 And I went through all of their exhibits, citing. And
21 there's no evidence. And I'd like to go through them,
22 Your Honor, if you want. I don't know if you have time, but --

23 **THE COURT:** We don't have time.

24 **MR. VERHOEVEN:** Well, there's not a single piece of
25 evidence here that supports --

1 They cite --

2 I'll just summarize. They cite to, in their Exhibit 34 --
3 to an e-mail. Levandowski's not an addressee. He's not
4 mentioned in the e-mail. They say that this supports that
5 there was confusing, contradictory, misleading information
6 about the bonus.

7 Well, this -- this e-mail is about tax treatment. And
8 it's about the Tax Department giving confusing information
9 about what you need to withhold on the bonus. It has nothing
10 to do with whether the bonus is getting paid. It's complete
11 half-truth, as Your Honor said.

12 They cite to texts that Mr. Levandowski had; but the text
13 is actually dated the day he received his bonus on August 12th.
14 And the text is --

15 The first text is from Mr. Don Burnette, who was a former
16 co-worker: Dollar sign, dollar sign, dollar sign, question
17 mark.

18 Mr. Levandowski responds, "Boooooom," with five "o"s,
19 meaning he got paid.

20 And then there's -- so, you know, they -- then they cite
21 to deposition testimony that doesn't say anything. There's one
22 deposition where one person says that he thought that
23 Levandowski said something; that he was concerned. That's it.
24 And that's hearsay.

25 **THE COURT:** How many -- that's Kalanick?

1 **MS. DEARBORN:** No.

2 **MR. VERHOEVEN:** No. That's another person.

3 **THE COURT:** All right. Who was that?

4 **MR. VERHOEVEN:** Well, let me see. That was -- so
5 they cite to Pennecot. And he says nothing about Levandowski
6 saying he was concerned.

7 They cite to Gruver. And that's the one. He says, *He*
8 *expressed concern after we both left Google about the delivery*
9 *of what he called the second part of the bonus.*

10 *When did he express this concern?*

11 *Around the time that -- because I left Google before him,*
12 *a supposed process, that the remaining 60 percent of the bonus*
13 *would be paid post six months, at the end of the employment at*
14 *Google. And he was interested in when or if I had -- when I*
15 *and how I received my second payment.*

16 This is the only thing, out of all of the evidence they
17 have, where they're talking about Levandowski even expressing a
18 concern.

19 It's hearsay. It's talking about what -- it's one of
20 their employees talking about what another of their employees
21 said, and offering it for the truth. And it has absolutely
22 nothing to do with downloading. It has absolutely no statement
23 about tying the concern on bonus to downloading.

24 **THE COURT:** What was the time period of that
25 statement that the deponent says; when it occurred?

1 (Pause in proceedings.)

2 **MS. DEARBORN:** That was later, Your Honor. It was in
3 August of 2016, as I recall, or around that time.

4 But Your Honor, that is not hearsay because --

5 **THE COURT:** By that point he had already been paid;
6 hadn't he?

7 **MR. VERHOEVEN:** He got paid on August 12th.

8 **MS. DEARBORN:** No. The testimony was regarding
9 before he got paid, and that he was concerned that he would get
10 paid, Your Honor. And that is admissible under the hearsay
11 exception for state of mind.

12 **MR. VERHOEVEN:** You know, they say "state of mind,"
13 Your Honor, but they cite to a document that proves that that's
14 ridiculous: Their Exhibit 28.

15 They say, *Oh, well, you know, we -- based on all of this*
16 *circumstantial evidence, we had a state of mind that we thought*
17 *that, even though there's no evidence of it -- that Levandowski*
18 *down -- did this illegal downloading for bonus purposes, and*
19 *not to help us.* And they cite to Exhibit 28.

20 And Exhibit 28, in itself, shows that Uber knew, for
21 example, on the first payment, when it would be paid. And they
22 say, *Oh, it was delayed.* And Uber knew. This is on the bottom
23 line of this exhibit. And it's an exhibit they don't
24 authenticate. It's actually electronic notes of John Bares, if
25 Your Honor's interested. He was the head of the ATC, which is

1 their -- at the time, their AV program.

2 And there's a cite to Levandowski. It says nothing about
3 concern about a bonus. In fact, what it shows is he's
4 telling -- in September of 2015 he's telling the head of Uber's
5 program, while he's still an employee of Waymo, that he wants
6 to do a start-up, and wants to take a group with him. Lots of
7 laser experts in the group. Worried about Google finding out.

8 There's nothing in there about: I'm worried about my
9 bonus, and not getting paid.

10 And then the next entry in the notes, another individual
11 informs Bares that -- they're talking about: What's the
12 magnitude of the pay-out? Because they're negotiating about
13 the magnitude of the pay-out globally for all employees.

14 And he says it won't be known until the valuation is
15 fixed. Might take another six weeks after October 13th.

16 So they knew. Uber had inside information from Urmson and
17 Levandowski, who were both working at Waymo, that the bonus was
18 going to be, although it was notionally -- and in the
19 contract -- in October, that it was going to be delayed until
20 December. And that's exactly when they got paid.

21 So this notion that they had some state of mind because of
22 representations by Levandowski, which was precluded -- or -- or
23 any other basis --

24 **THE COURT:** Well, is there --

25 **MR. VERHOEVEN:** Just nothing there.

1 **THE COURT:** Is there internal Waymo evidence from the
2 higher-ups, say, at Waymo, where somebody writes an e-mail to
3 someone else that says something like, *Maybe we're not going to*
4 *pay Levandowski his second half of his bonus. He's in trouble*
5 *on that*; something like that? Do you have anything like that?

6 **MR. VERHOEVEN:** Zero.

7 **MS. DEARBORN:** I'm not aware of anything like that,
8 Your Honor, but that --

9 **MR. VERHOEVEN:** The opposite.

10 **MS. DEARBORN:** But again, you know, what I heard
11 Mr. Verhoeven do is he just went through piece of evidence,
12 after evidence, after evidence; testimony from Waymo's own
13 witnesses; documents; et cetera. That is all circumstantial
14 evidence that Mr. Levandowski, along with many other members of
15 the Chauffeur team, was concerned about his bonus in December
16 of 2015, and was also concerned about it in August of 2016.

17 Your Honor, this -- what I hear Mr. Verhoeven doing is
18 he's attempting to exclude --

19 **THE COURT:** Yes, but where is the proof that connects
20 the dots that his concern got translated into, *I'd better*
21 *commit a federal crime, and download all of this information,*
22 *so that I can hold them hostage?* Where is that step?

23 **MS. DEARBORN:** That is for the jury to decide,
24 Your Honor. That is the import of the circumstantial evidence.

25 And I would point out that Waymo has no direct evidence,

1 themselves, that Mr. Levandowski downloaded these files in
2 order to steal them and use them at Uber, either.

3 Both parties are going to be marshaling circumstantial
4 evidence in order to try to explain why Mr. Levandowski may
5 have done what he did.

6 There's -- and it is simply -- it is completely uneven and
7 completely unwarranted to exclude circumstantial evidence, and
8 Uber's theory or Uber's explanation, and admit Waymo's, when's
9 there's no -- there's no direct evidence on either side,
10 Your Honor.

11 **THE COURT:** Isn't there -- my memory is that way back
12 when the case started, and before he took the Fifth Amendment,
13 Mr. Levandowski told the people at Uber that he did it so he
14 could work at home.

15 **MS. DEARBORN:** Yes, Your Honor. He did say that.

16 **THE COURT:** Is that true?

17 **MR. VERHOEVEN:** Yes.

18 **THE COURT:** Okay. So he didn't say, *I did it so that*
19 *I could hold them hostage on my bonus.*

20 **MS. DEARBORN:** Your Honor, the fact of the matter is
21 Mr. Levandowski is taking the Fifth. We don't know why he may
22 have done what he did. We don't know.

23 **THE COURT:** Right.

24 **MS. DEARBORN:** And so all we have -- both parties are
25 in the same boat here. All we have is we have pieces of

1 circumstantial evidence that we can try to use.

2 And again, Waymo is going to try to use their own
3 evidence. They're going to try to tell their own story.

4 And all we are asking is the chance to rebut it.

5 **THE COURT:** Yes, but their story is more direct.
6 Their story is he downloaded 14,000. Very shortly thereafter,
7 he left. He went and formed a company, which he sold to Uber
8 for \$680 million. And then he got in charge of that program.
9 And they claim that they can now trace several of the trade
10 secrets directly into the Uber design.

11 That's not circumstantial evidence. That's direct
12 evidence that the trade secrets were taken and then used by
13 Uber.

14 And the motive is irrelevant. You don't even have to
15 prove motive -- do you? -- as long as he takes them.

16 **MR. VERHOEVEN:** No.

17 **THE COURT:** So I think these are not analogous
18 circumstances, in my view; that your attempt to prove that he
19 did it for some other reason -- there's direct proof of what he
20 actually did do.

21 **MR. VERHOEVEN:** Your Honor, may I respond real
22 briefly? I have three points to make.

23 One. The answer to your question -- how the dots get
24 connected -- they don't. Zero evidence. Number one.

25 Number two, Counsel says that things I went through are

1 circumstantial evidence; that he was concerned. Doesn't say
2 there's circumstantial evidence that he downloaded because of
3 his bonus; but that he was concerned.

4 If you look through this, every single -- none of these
5 pieces of evidence show that Levandowski was concerned. They
6 aren't even circumstantial evidence that he was concerned, with
7 the sole exception of the Gruver transcript, which I
8 forthrightly read to you. And that sole piece of evidence is
9 hearsay.

10 So they have zero evidence -- even circumstantial
11 evidence -- to support this theory.

12 And then finally they say we don't have direct evidence.

13 We have the download testimony we just got, the
14 Stroz Report, in which they've -- Stroz identified 24,000 files
15 from the same server. And we -- we've been working with Stroz,
16 and we've identified those files; and all but 7 of those files,
17 of the 14,000 downloaded, are found in Levandowski's personal
18 computer in that grouping of 24,000 files.

19 And to say that's circumstantial evidence -- that's silly.

20 And we have more and more and more.

21 So it's apples and oranges here.

22 That we have some circumstantial evidence combined with
23 direct evidence doesn't mean that they get to make up a theory,
24 and say that the jury can just rely on circumstances and
25 timing, and -- when it can't even point Your Honor to a single

1 piece of admissible evidence.

2 **MS. DEARBORN:** I would be very surprised if
3 Mr. Verhoeven, in Opening Statement, did not tell the jury that
4 Mr. Levandowski downloaded these files in order to use them at
5 Uber. I would be shocked if he didn't say that.

6 And he has no evidence of that. There's no evidence that
7 that is why Mr. Levandowski did what he did.

8 **THE COURT:** But there is the follow-on evidence that
9 he had files; that some of them evidently got used at Uber. At
10 least, that's the allegation. I'm not -- that's for the jury
11 to decide.

12 **MS. DEARBORN:** Yes.

13 **THE COURT:** And that's direct proof that -- and the
14 timing of it is that he does it right before he leaves, and
15 right when he's setting up a company that he sells for
16 \$680 million to Uber.

17 To me, that's pretty strong evidence.

18 And -- but what you have on this alternative theory is
19 exceedingly weak. It's -- I'm not even sure a rational jury
20 could draw that inference.

21 **MS. DEARBORN:** So, Your Honor, I actually need to
22 make a very important point right here, which is that what
23 Mr. Verhoeven is doing and what I hear the Court doing is
24 evaluating the strength of the evidence. And --

25 **THE COURT:** Under Rule 403, I get to do that. I do.

1 **MS. DEARBORN:** Actually, Your Honor, under
2 *United States versus Evans*, which is a Ninth Circuit case that
3 we cited in our papers, the Ninth Circuit held that it is the
4 proper analysis under Rule 402, is to understand the evidence;
5 is to evaluate the probativeness of the evidence, if it is
6 believed, if it is credited.

7 **THE COURT:** Of course.

8 **MS. DEARBORN:** So the proper analysis is whether this
9 evidence, if believed, is relevant. And of course it is,
10 Your Honor.

11 **THE COURT:** But we don't have a single piece of
12 evidence that says he did it for that reason. You have
13 evidence about the timing of the bonus; things that are not in
14 controversy. And then you want to draw a far-fetched,
15 fantastic inference from that, that that's where the probative
16 value comes in.

17 Yeah. I accept that I have to believe in it, but that --
18 I have to believe the underlying evidence, but not the
19 inference. The question for the Judge is: Is that inference
20 probative?

21 All right. Ms. Dearborn, you get to say one last thing,
22 and then it's time for our break. So we're going to take a
23 break for 15 minutes. Go ahead. One last thing.

24 **MS. DEARBORN:** Yeah. Yes, Your Honor.

25 I again reemphasize that both parties are marshaling

1 circumstantial evidence; that the probativeness of the evidence
2 is for the jury to decide.

3 And we have laid out on multiple occasions the
4 circumstantial evidence that we -- that we have, in addition
5 to -- on this theory, we have laid out on June 28th, and we
6 laid it out in June 29th in a hearing. We have -- we offered
7 up proof. We submitted an offer of proof on corroborating
8 evidence. That's Docket 829. And we responded to it in
9 response to Waymo's Interrogatory Number 9.

10 This has been part of the case for a long time. If they
11 want to argue that our inferences are unreasonable, they get to
12 argue that before the jury, Your Honor; but we would submit
13 that we get to submit this.

14 **THE COURT:** All right. Under submission.

15 Let me leave for the 15-minute break with one last thing
16 that I always want to make sure I say at the final pre-trial
17 conference; and that is sometimes a party wins a motion *in*
18 *limine*, and items get excluded. And then when we get to the
19 trial, they wind up opening the door, by making some argument
20 that takes unfair advantage of the exclusion. Then I just open
21 the door, and let it back in.

22 So both sides are in this position where -- I promise
23 you -- it's just not right to take advantage of -- make an
24 unfair argument based upon an exclusion. So that goes for both
25 of you. And just keep that in mind.

1 All right. We'll take a 15-minute break. Thank you.

2 (Recess taken from 9:45 a.m. until .m.)

3 (Proceedings resumed at 10:01 a.m.)

4 **THE COURT:** All right. Be seated, please. Thank
5 you.

6 Back to work.

7 Okay. Let's see if we can work on some more
8 *motions in limine*.

9 If I understand this one, Otto Trucking wants to exclude
10 any reference to Levandowski's downloading of 14,000 files on
11 account of Sasha saying they were low value and that this was
12 not suspicious.

13 Okay. I'm missing something, but to me this is a
14 nonstarter. I don't know why you would even make this motion.

15 **MR. CHATTERJEE:** Your Honor, what we're talking about
16 here is really about an argument that they want to make about
17 anomalous behavior.

18 And the reason why is because we have tried to probe into
19 the metadata and the log data that Google has associated with
20 activities of Mr. Levandowski and other Chauffeur members and
21 to see is this downloading activity typical or atypical.

22 We know now that when you follow the instructions, that
23 there's a full checkout that occurs. We know that now. I
24 don't think that's really in dispute.

25 But when we tried to probe into the discovery around all

1 the logs for Mr. Levandowski's activities -- for example, had
2 he used card readers before -- there's evidence from other
3 people that they did use card readers on the floor of Google's
4 research projects, that those are things that they did there.

5 And for Waymo or Google to preclude us from having that
6 discovery but then to suggest that this is anomalous behavior
7 where we can't test it is not a fair thing to do.

8 **THE COURT:** What do you mean they precluded you from
9 having discovery?

10 **MR. CHATTERJEE:** So we asked for all the log data
11 associated with Mr. Levandowski and other Chauffeur members.
12 That was the same thing that Mr. Brown used to triangulate on
13 the specific downloading activity, but we asked for a longer
14 time period looking for information about that. They said it's
15 too difficult and they wouldn't give it to us.

16 **THE COURT:** Well, what did the magistrate judge say?

17 **MR. CHATTERJEE:** We went to the magistrate judge when
18 they said it was too difficult. We asked for a set of
19 stipulations on those issues, and the magistrate judge said
20 that we could not get that stipulation from them.

21 **THE COURT:** If she's ruled against you, maybe you had
22 asked for the wrong thing, and now you want me to bail you out.

23 **MR. CHATTERJEE:** Your Honor, all we're asking for is
24 that they can't come in and say that there was unusual behavior
25 but then preclude us. That's submission of an item that

1 they're trying to make -- inference to make to the jury but
2 refusing to produce it on the grounds of burden and letting us
3 test that. They shouldn't be allowed to do that, Your Honor.

4 **THE COURT:** All right. Let me hear from the other
5 side.

6 **MR. PERLSON:** Your Honor, this is -- most of the
7 motion, frankly, is about the statements about low value and
8 things that we spent all that time on last week. There's one
9 small portion of it that deals with what he says, but we've
10 produced logs -- all sorts of logs in this case. They've asked
11 witnesses about this issue, several witnesses about this issue;
12 and then --

13 **THE COURT:** Well, what is it you did not produce so
14 that I can --

15 **MR. PERLSON:** I don't know what he's talking about.

16 **THE COURT:** He said you produced zero logs other than
17 Levandowski.

18 Is that true? Is that what you're saying?

19 **MR. CHATTERJEE:** Your Honor, I can tell you exactly
20 what they did produce. With the SVN system, they produced I
21 think 20 sample logs associated with other users' behavior.
22 Almost all of them showed that there were full checkouts from
23 the different users at --

24 **THE COURT:** Why can't you, then, use that evidence to
25 make your point?

1 **MR. CHATTERJEE:** Because the suggestion that Waymo is
2 trying to make in this case is that this was an unusual
3 activity by Mr. Levandowski.

4 There are other units of data, such as the Uber proxy
5 logs, the MoMA logs, and other logs that are internal to Google
6 that they did not produce us -- produce information on except
7 for the isolated incident of Mr. Levandowski's so-called
8 downloading in December of 2014.

9 **THE COURT:** Say that last part again. You're saying
10 there's some kind of log that they only produced on Levandowski
11 but nobody else?

12 **MR. CHATTERJEE:** Correct. And they --

13 **THE COURT:** What's the name of that kind of log?

14 **MR. CHATTERJEE:** One of them is called the Uber Proxy
15 Log.

16 **THE COURT:** All right. Let's stop there.

17 Is that true? Uber Proxy Log?

18 **MR. PERLSON:** Your Honor, this isn't -- the specifics
19 that he's talking about isn't in his motion. I don't know
20 every single log that's been produced, but we've produced logs
21 far beyond Levandowski as he acknowledges.

22 We produced logs for -- like full SVN log data, not just
23 for Levandowski but every individual who accessed the SVN
24 server. We produced that in June of this year.

25 And we did object to other log data, but the Court said,

1 "If you want other log data, you should move to compel," and
2 they didn't.

3 **THE COURT:** I don't get this part right here.

4 Look, your company -- maybe it's not your company, but
5 it's the Uber company -- has now hired away all these engineers
6 from Waymo. You've got ready-made dozens of engineers who
7 could come in and say just what you're saying, "Yeah, I've used
8 that SVN system and what you're describing there is not
9 unusual."

10 You've got plenty of people who could debunk the theory if
11 it's -- but now instead of doing that and going to your own
12 people, you're blaming them for not turning over evidence.

13 **MR. CHATTERJEE:** Your Honor, they're going to use --
14 they're going to have two forensic people come in, and this is
15 tied at some level to the *Daubert* motions we filed on Gary
16 Brown and Kristinn Gudjonsson who are going to try and suggest
17 that the activity was unusual, but they didn't look at any of
18 that other data and they wouldn't let us test those opinions.

19 That is different than the users saying they did it
20 because the metadata will say whether it happened or not.

21 **THE COURT:** Look, I'm denying this motion. This is a
22 half-baked motion, and the evidence is quite strong that
23 Levandowski downloaded these, then left, sold the company for
24 \$680 million. That's what the whole due diligence thing was
25 about.

1 And to suggest that he -- that everybody else in the
2 company did the same thing he did, there's probably zero people
3 who did what he did. And you have total access to lots of them
4 that work for your own company; and if they think it was so
5 innocent, they can come in and say so.

6 So this motion is D-E-N-Y, denied. Thank you.

7 **MR. PERLSON:** Thank you.

8 **MR. CHATTERJEE:** Thank you, Your Honor.

9 **THE COURT:** All right. Now we go to Number 2.

10 No. That gives me a headache to think about Number 2.
11 We're not going to go to Number 2 right now.

12 One thing I want to be clear again, I want to say this.
13 Waymo should not say to the jury that Uber tried to withhold
14 the Uber due diligence report after they changed their
15 position. Now, it's true they did that up to a point, but it
16 was Levandowski that took that appeal.

17 So you must be honest with the jury about that. If you're
18 not, I'm going to interrupt your argument, even your opening
19 statement, and correct it.

20 Okay. Now we go to the Benchmark lawsuit. To me, all of
21 this should be excluded. I should grant Number 22. So let's
22 hear from Waymo as to why this should come into evidence but
23 the stuff you're trying to keep out that's of equivalent low
24 value should be excluded.

25 **MR. VERHOEVEN:** Your Honor, first point, there's two

1 issues that they're combining in this *motion in limine*. One is
2 reference to this lawsuit -- to the Benchmark lawsuit.

3 **THE COURT:** Benchmark.

4 **MR. VERHOEVEN:** Right.

5 **THE COURT:** Correct.

6 **MR. VERHOEVEN:** The other is the testimony from a
7 percipient witness, Mr. Gurley, about his knowledge at the
8 time, his conversations as a board member of Uber with
9 Mr. Kalanick and with the other board members, and that
10 testimony is highly, highly relevant.

11 **THE COURT:** Read it to me. Tell me what he said that
12 was so fantastic.

13 **MR. VERHOEVEN:** Well, he said that -- I'll paraphrase
14 in the interest of time, and if you want to actually see it --

15 **THE COURT:** All right.

16 **MR. VERHOEVEN:** He said that he was involved in the
17 decision of whether or not to make the acquisition, that was a
18 board-level decision of Ottomotto; that Mr. Kalanick made a
19 presentation to the board. There's a document that's in
20 evidence -- that's been produced of that presentation.

21 I asked him questions about what was said about the
22 various parts of the document. He told me what was said. He's
23 told me that Mr. Kalanick said -- there's a lot of references
24 in the document to due diligence. There's a reference to the
25 due diligence report. There's a reference to indemnity.

1 I asked him about these things. He said that Mr. Kalanick
2 told the board that the Stroz report of that investigation came
3 up clean is what he said.

4 He testified that he obtained the Stroz report later and
5 that he read it for the first time later, and that he was -- I
6 can't remember his exact words, but he was very angry; and he
7 testified that if he had known what the Stroz report actually
8 said at the time that they were making the decision on the
9 acquisition, he would have voted no.

10 So that's one series of very important --

11 **THE COURT:** All right. Let's just hold that one.

12 **MR. VERHOEVEN:** Okay.

13 **THE COURT:** Okay. What do you say to the testimony
14 of Gurley on the point that I just heard?

15 **MS. DUNN:** The first thing I would say, Your Honor,
16 is this is present-day testimony of someone who is suing
17 Mr. Kalanick in a separate lawsuit.

18 **THE COURT:** Gurley is?

19 **MS. DUNN:** Correct. Benchmark is.

20 And Mr. Gurley was deposed under oath knowing full well
21 that his under-oath testimony would impact this new lawsuit
22 that Benchmark has brought against Mr. Kalanick, and so his
23 testimony must be looked at through that prism.

24 And I will incidentally say that that lawsuit was even
25 characterized by Mr. Verhoeven's firm, who represented a

1 different shareholder in it, as being inflammatory and having a
2 goal of vilifying Mr. Kalanick and getting press attention. So
3 that's the first thing I would say.

4 The second thing I would say, as to present-day
5 speculative comments about what Mr. Gurley might have thought
6 in April of 2016 is that the Stroz report was not even done
7 until August. So he can't even -- it's like speculation on top
8 of speculation, what he might have thought in April about a
9 report in August that he is saying in the present day.

10 **THE COURT:** All right. Some of that's a good point,
11 but there was not -- the thing about Kalanick said it was clean
12 is not a present-day deal. That's a historical fact if it
13 occurred, and why wouldn't that be admissible?

14 **MS. DUNN:** Well, this was to my first point, which is
15 that I think Mr. Gurley's entire testimony needs to be looked
16 at by Your Honor as somebody who is testifying with the
17 knowledge that he is separately suing Mr. Kalanick.

18 **THE COURT:** All right.

19 **MS. DUNN:** But --

20 **THE COURT:** I have that in mind.

21 **MS. DUNN:** Okay.

22 **THE COURT:** But that doesn't automatically exclude
23 somebody.

24 **MS. DUNN:** I understand that.

25 And I think that in our motion we allow for the fact that

1 Mr. Gurley has very limited firsthand knowledge about the
2 events here; and if he is allowed to come to court and says
3 what Mr. Verhoeven just says he said, he will be vigorously
4 cross-examined as to that.

5 **THE COURT:** Well, I mean, is your view that Kalanick
6 did not say to the board that the Stroz report came up clean?

7 **MS. DUNN:** Your Honor, Mr. Kalanick is set to be
8 deposed, presumably by Mr. Verhoeven, several days from now,
9 and I don't wish to --

10 **THE COURT:** All right. So --

11 **MR. VERHOEVEN:** So they instructed us not to -- they
12 instructed the witness not to answer those questions,
13 Your Honor.

14 **MS. DUNN:** Your Honor, his last deposition, just to
15 be clear about this again, happened before the Federal Circuit
16 ruled on Stroz. So that is precisely why Mr. Verhoeven gets
17 to --

18 **THE COURT:** All right.

19 **MS. DUNN:** -- redepose.

20 **THE COURT:** All right. When is his deposition?

21 **MS. DUNN:** October 2nd.

22 **THE COURT:** All right. I understand enough about
23 that.

24 **MR. VERHOEVEN:** Your Honor, may I respond briefly?

25 **THE COURT:** Wait a minute.

1 (Pause in proceedings.)

2 **THE COURT:** Okay. Yes, please.

3 **MR. VERHOEVEN:** First of all, we noticed Gurley's
4 deposition before there was any lawsuit. We noticed it six
5 weeks. We had to move to compel it, and Judge Corley granted
6 that motion. Obviously the magistrate judge thought his
7 testimony was relevant.

8 Just so you know, that Uber would refuse -- or the notion
9 that Uber isn't working with Benchmark is silly. I took the
10 deposition. They were all lined up on the -- all the counsel
11 for everybody was lined up on the table on the other side.
12 They all agreed that objection for one will be objection for
13 all of them. It was like me against a field of 20 people. So
14 the notion that they aren't still cooperating as with respect
15 to this lawsuit is silly.

16 Two, the only thing I've heard is, "Hey, he is biased
17 because his company filed a lawsuit." But under that
18 reasoning, Your Honor, there wouldn't be any witnesses in this
19 case because all of the percipient witnesses are a part of a
20 company that is involved in this case, and you can make
21 arguments about bias as to any of them. That doesn't support
22 excluding important detailed testimony.

23 Gurley testified under oath as to percipient events as a
24 percipient witness, and I just gave you one example of his
25 testimony that's relevant.

1 He also --

2 **THE COURT:** The part about what he would have done is
3 not so relevant. That's just hindsight with the benefit of
4 somebody who is suing him --

5 **MR. VERHOEVEN:** Well, Your Honor --

6 **THE COURT:** -- but the percipient testimony that he
7 said clean, okay, I think you've got a stronger point there.
8 What else did he say on a percipient basis?

9 **MR. VERHOEVEN:** Well, he said -- before I go to the
10 other thing, just one sentence on that. No one else can say
11 what he would have done if he'd known about it. It's about
12 what he would have done back then. It's not about his opinion
13 today.

14 If we can't ask him that --

15 **THE COURT:** The way to get at it is a different way.
16 The way to ask that question is: Was that a material point to
17 you that they said it was clean?

18 **MR. VERHOEVEN:** I did ask that.

19 **THE COURT:** All right. Well, then --

20 **MR. VERHOEVEN:** And he said it was --

21 **THE COURT:** -- he can explain why it was material.

22 **MR. VERHOEVEN:** He said it was critical.

23 **THE COURT:** All right. But then you don't get to ask
24 the question, over objection anyway, "Would you have done it?"
25 I know that people get away with that all the time, but that

1 technically is -- it's not worth much at this stage.

2 **MR. VERHOEVEN:** In any event, moving on, he also was
3 personally present at board meetings. You've heard that
4 Mr. Gonzalez has told you vehemently that Uber intends to
5 present to the jury this story that Levandowski wasn't
6 cooperating and the whole thing about Uber being different than
7 Levandowski.

8 Well, this testimony is highly relevant to that. He
9 testified that he was -- as to his statements at board meetings
10 where Mr. Kalanick was present, where he recommended, based on
11 what he called best practices, that Mr. Levandowski be fired,
12 repeatedly he did this.

13 **THE COURT:** Who is the "he" you're talking about?

14 **MR. VERHOEVEN:** Mr. Gurley, a board member of Uber.

15 And that Mr. Kalanick solely voted not to do it several
16 times. He testified that they had to set up a special
17 committee to try and deal with the resistance from Kalanick.

18 **THE COURT:** Well, are you going to get -- I mean, why
19 wouldn't that part be relevant? Since Uber itself is going to
20 place in evidence the fact that they fired Levandowski, why
21 can't the other side get into the history that led up to that
22 decision?

23 **MS. DUNN:** Your Honor, first of all, I think this is
24 why it is best to not paraphrase from deposition testimony,
25 because this is not a precise characterization of what

1 Mr. Gurley said about Mr. Kalanick's decision to fire
2 Mr. Levandowski.

3 **THE COURT:** What did he say?

4 **MS. DUNN:** It's also not germane to Your Honor's
5 decision, but I think it's important that we're clear.

6 Mr. Gurley also talks about a board meeting where before
7 it even starts, Mr. Kalanick comes in and announces his
8 decision to terminate Mr. Levandowski, which he did make.

9 I think that there are a couple things I want to just
10 aggregate. The first thing is testimony that is entirely
11 speculative, as Your Honor says, which is what Bill Gurley or
12 Benchmark would have thought in April based on information that
13 they couldn't have even had in April and only have now when
14 they're suing.

15 **THE COURT:** When you say they could not have had it
16 in April, wasn't in April -- didn't Morrison & Foerster have
17 the preliminary version of the due diligence report by then?

18 **MS. DUNN:** There was no written report in April.
19 They had an oral.

20 **THE COURT:** All right. So maybe that's what they
21 were referring to when they said it was clean.

22 **MS. DUNN:** I don't think we should take on faith that
23 that was said.

24 **THE COURT:** Yes, but -- I'm not --

25 **MS. DUNN:** Right.

1 **THE COURT:** -- but your point about timing is April
2 versus August, and I'm saying to you there were two steps in
3 the due diligence; one was preliminary, one was final.

4 **MS. DUNN:** Correct.

5 **THE COURT:** As far as I can tell, nobody ever looked
6 at the final. Nobody. They did the deal already, and I don't
7 know if anybody ever looked at the final, but that preliminary
8 report was very important. Maybe that's -- conceivably it fits
9 with the timing.

10 **MS. DUNN:** Well, the topic of due diligence was
11 discussed at the board meeting, that is true.

12 The statement at issue by Mr. Gurley is, sitting here now,
13 he says, "Well, if I had seen this report."

14 **THE COURT:** I'm telling you that that would not be
15 permissible --

16 **MS. DUNN:** Right. Great.

17 **THE COURT:** -- but he would be able to say, "In my
18 view, this was a material representation that it was clean."
19 Because if that, in fact, was true and actually in his mind at
20 the time, that's legitimate to put before the jury.

21 **MS. DUNN:** I think the difficulty here -- Your Honor,
22 ordinarily I would agree with that. Obviously as a percipient
23 witness, even somebody who has -- he has extremely limited
24 firsthand knowledge of events, but there were board meetings he
25 was at where he could testify to his own -- you know, what he

1 thought and his statements.

2 The issue that we have now is really the problem that the
3 Benchmark lawsuit discusses the Stroz report. So you have
4 Mr. Gurley being deposed now having several weeks ago filed a
5 lawsuit; and when he comes in and says something now, it is
6 very likely with full cognizance in service of Benchmark's
7 lawsuit.

8 So I don't know how valuable that testimony could possibly
9 be given that now there's this other lawsuit messing things up.

10 **THE COURT:** Yeah, it messes it up, but everyone in
11 this lawsuit has some axe to grind already by virtue of this
12 lawsuit. So --

13 **MS. DUNN:** Well, I think it's different to be in
14 active litigation against somebody and then say, "Oh, well,
15 they said X or Y, you know, two years ago that implicates my
16 present-day lawsuit."

17 And Uber's position, and I think the Court understands, is
18 that that lawsuit should not come in and shouldn't be an issue
19 at this trial; but then we have --

20 **THE COURT:** It shouldn't come in unless this:
21 Unless, let's say, Waymo puts him on the stand to say, "I was
22 at the board meeting. He said it was clean. That was
23 material." End of testimony.

24 And then you want to cross-examine. Well, then maybe
25 you're the one that wants to put in the fact that he's got his

1 own lawsuit going.

2 **MS. DUNN:** But I think --

3 **THE COURT:** So I could see it coming up that way.

4 That would be legitimate cross-examination.

5 **MS. DUNN:** But that puts Uber in a position that it
6 should not be put in, which is that in order to expose
7 Mr. Gurley's evident bias, we have to now introduce the subject
8 of this lawsuit.

9 **THE COURT:** Well, that happens all the time. There's
10 nothing -- I mean, there's no God-given right to not be put in
11 that position.

12 **MS. DUNN:** I was hoping there was a court-given
13 right.

14 **THE COURT:** No, there's not even a court-given right.
15 So I --

16 **MS. DUNN:** I understand. I understand, Your Honor.
17 I think this is -- because of this Benchmark lawsuit, it has
18 complicated the situation unnecessarily.

19 **THE COURT:** But that would be your decision. I mean,
20 you could just say, "We'll take our lumps. We're not even
21 going to get into it," and go to the next witness.

22 I mean, are you really going to quarrel with the fact that
23 the clean due diligence report was a material factor? Why
24 would you even do the due diligence report if it wasn't going
25 to be a material factor? Of course, it was material, and it

1 seems to me you would just wave that off and say, "No
2 cross-examination."

3 **MR. VERHOEVEN:** Your Honor, may I briefly respond?

4 **THE COURT:** You're not -- you can't put the question:
5 What would you have done? Over objection, you cannot do that.
6 What would you have done?

7 Now, if the other side starts doing it on all their
8 witnesses, maybe I'll let you get away with it; but that is
9 not -- that does call for a lay opinion, and I think in this
10 case I would not allow that lay opinion. I think he should
11 just stick to the historical facts, that it was a material fact
12 at the time and he thought it was at the time and here's why he
13 thought it was a material fact at the time. That would be good
14 enough.

15 **MR. VERHOEVEN:** Okay. I mean, I remember hearing
16 Your Honor's discussion about opinion testimony from percipient
17 witnesses earlier, and I remember clearly you said if it's an
18 opinion today and it hasn't been disclosed under Rule 26, then
19 I'm not going to let it happen; but if it relates to that
20 period in time when the witness is a percipient, and so that's
21 all I'm getting at.

22 **THE COURT:** No, that's not what I said.

23 **MR. VERHOEVEN:** All right.

24 **THE COURT:** You're saying if it relates to -- no. If
25 he had that opinion back then, then it is different from an

1 opinion that he's recently formed today to comment as in
2 commentary on the past events; but if he actually had the
3 opinion back at the time in question that if the report was not
4 clean, that he would have voted the other way, maybe I would
5 allow that.

6 **MR. VERHOEVEN:** That's what he testified.

7 **THE COURT:** You know --

8 **MS. DUNN:** Right.

9 **THE COURT:** No. Did he? Did he say that or did he
10 say -- if the question was "What would you have done if you had
11 known," that's a present-day deal, that would not be allowed.

12 But if you were to say, "Okay. Mr. Gurley, back then did
13 you actually have in mind what you would have done back then if
14 it had been a nonclean report?"

15 He says, "Yes, I actually thought about it and back then I
16 had such an opinion."

17 "Okay. What was it?" Maybe I would allow that, but in
18 any circumstances I would be highly suspect --

19 **MR. VERHOEVEN:** Okay.

20 **THE COURT:** -- that he has been primed to say that
21 and I might not allow that. We might even have to have a
22 little evidentiary hearing to get to the bottom of that.

23 **MR. VERHOEVEN:** Okay. I read you loud and clear.

24 Can I just briefly respond?

25 It sounds like from what counsel said that there's now an

1 agreement that we can call him and testify about what he has
2 percipient knowledge of. Maybe I misread that.

3 Secondly --

4 **THE COURT:** Well, that's what I'm saying. He's on
5 the board. He's dealing with the acquisition. I think, of
6 course, he can do that --

7 **MR. VERHOEVEN:** Right.

8 **THE COURT:** -- subject to, you know, something
9 inflammatory that shouldn't come in evidence. So, yes, what
10 you told me about the due diligence report, I would allow that
11 all day long; that it's clean --

12 **MR. VERHOEVEN:** Right.

13 **THE COURT:** -- and that was material, "I voted to
14 approve," those are percipient facts.

15 **MR. VERHOEVEN:** Right.

16 **MS. DUNN:** Right. But just to be --

17 **MR. VERHOEVEN:** Can I finish, please?

18 **MS. DUNN:** Just to be clear --

19 **THE COURT:** Wait. One of you at a time.

20 Finish your point.

21 **MR. VERHOEVEN:** I'm just going to finish real
22 briefly.

23 With respect to what counsel says about bias, I mean,
24 she's trying to have her cake and eat it too. She's trying to
25 exclude this witness because of the complaint for the reason

1 that this witness is biased, but she doesn't want to have to
2 tell the jury why the witness is biased. That's -- you know,
3 that's --

4 **THE COURT:** I don't -- look, you win on that point.
5 I'm not going to exclude the witness --

6 **MR. VERHOEVEN:** Okay.

7 **THE COURT:** -- on that.

8 **MR. VERHOEVEN:** And then --

9 **THE COURT:** For goodness sakes, it's their own board
10 member. Come on.

11 **MR. VERHOEVEN:** And then just briefly on the lawsuit
12 part, because I said there are two parts of this.

13 **THE COURT:** Yeah.

14 **MR. VERHOEVEN:** On the lawsuit part, we wouldn't be
15 asking to put in, like, the full-on complaint or anything, but
16 this witness testified that he personally reviewed the
17 complaint and that, you know, it has factual allegations in it.

18 **THE COURT:** You're talking about your complaint or
19 the Benchmark?

20 **MR. VERHOEVEN:** No, no. The Benchmark complaint.

21 **THE COURT:** Look, I'm not going to let you bring out
22 the Benchmark case. No. That's too far afield. You can bring
23 out the things I told you. If the other side wants to do it
24 for purposes of bias, okay. I can see that. But you shouldn't
25 be allowed to front that.

1 **MR. VERHOEVEN:** Okay. Understood, Your Honor.

2 **THE COURT:** All right.

3 **MS. DUNN:** Your Honor, just a couple very quick
4 points.

5 First of all, we are verifying but do not know whether
6 Mr. -- he was not. He was never disclosed on their Rule 26
7 disclosures. So in considering our motion, which we hope
8 you'll take under submission, we ask you to please consider the
9 fact that this individual was never disclosed in the
10 disclosures.

11 The second thing is, as you can --

12 **THE COURT:** Let's pause on that a minute. I am
13 strict. You know, I am pretty strict when it comes to
14 disclosures; but, after all, he was a board member of yours at
15 the time and -- I don't know. It seems like that would have
16 been an obvious person to think of as a potential witness as to
17 what happened at these board meetings, so I'm not -- I don't
18 know. Maybe I would forgive that one in this case.

19 **MR. VERHOEVEN:** In addition, Your Honor, his
20 relevance became clear once we learned some facts about the
21 Stroz report; to wit, that he read it and we became -- it
22 became clear that he had important knowledge. We noticed it
23 promptly. They fought it. Judge Corley said we're entitled to
24 it. The idea they're being surprised is silly.

25 **MS. DUNN:** Actually, wait a second, because that's

1 exactly the point. He read it in the course of this
2 litigation.

3 This is a case about misappropriation of trade secrets.
4 It's not a case about what this board member thinks today about
5 the Stroz report. Mr. Verhoeven just made my point better than
6 I can, but he was not disclosed.

7 **THE COURT:** But, still, he was your board member.
8 He's not like some secret witness that somebody -- it's
9 somebody who is a player on the field who helped to prove this
10 deal. I --

11 **MS. DUNN:** Your Honor, there are numerous people on
12 the board at Uber and these people had very little firsthand
13 interaction with the facts of this case. There are many
14 obvious fact witnesses. I would say he is not one of them.

15 And as you consider this, Your Honor, in addition to lack
16 of disclosure --

17 **THE COURT:** All right. I'm going to consider -- all
18 right. I will.

19 All right. We've got to move on.

20 **MR. VERHOEVEN:** Okay. One -- can I just for one
21 response?

22 **THE COURT:** Hold on.

23 **MR. VERHOEVEN:** They fought successfully to prevent
24 us from deposing those other board members with the exception
25 of Kalanick.

1 **THE COURT:** All right. Here we go. Now we go to
2 one. Defendants want to preclude Waymo from simply tallying up
3 the entries of defendants' LiDAR communications log to suggest
4 the extent of Levandowski's involvement with the Uber in-house
5 program.

6 Well, why shouldn't they be allowed to do that? Who's
7 going to argue this?

8 Here comes somebody.

9 It seems to me that if there are 42,012 times that
10 Levandowski had something to do with LiDAR, that that's a
11 probative fact that shows that he was definitely in a position
12 to influence the course and direction of the Uber program, and
13 that that's a fact that the jury can consider. It won't take
14 much time to present that, and so why isn't that a legitimate
15 thing for the other side to use?

16 **MR. BULAND:** Your Honor, Cory Buland for Uber.

17 The answer is that adding up the entries on this log is
18 not probative of Mr. Levandowski's involvement with Uber's
19 in-house LiDAR, the specifications to design that are at issue
20 in this case.

21 What was ordered to be put on that log is extremely broad.

22 **THE COURT:** Well, what did -- remind me what I
23 ordered. I thought it had to do with LiDAR. Didn't I use the
24 word "LiDAR" in there?

25 **MR. BULAND:** Yes, Your Honor, you did, but I think

1 the point is that LiDAR is much broader than Uber's in-house
2 LiDAR. And in this case everything was logged where the
3 concept of lasers or laser manufacturers, even third parties
4 who had nothing to do with Waymo's product, were mentioned.

5 For example, there's entries on this log where
6 Mr. Levandowski's old boss at Google e-mails him and says,
7 "Hey, I want you to meet this guy who works in lasers. He
8 might have a product you might be interested in." That's on
9 the log. Not probative to the point they're trying to make.

10 So that's --

11 **THE COURT:** All right. Hold that thought.

12 What do you say to the fact that the log -- first, how are
13 you going to put this into evidence? What's going to be the
14 vehicle for getting this into evidence? A witness? I mean,
15 who's the witness?

16 **MS. ROBERTS:** Yes, Your Honor. It may be any number
17 of witnesses whose communications are listed on the log.

18 And so just to refresh Your Honor's memory --

19 **THE COURT:** It would have to be somebody who's
20 actually counted them. So who is that going to be?

21 **MS. ROBERTS:** And, Your Honor, I think the experts
22 who have reviewed the log have done the counting, and then we
23 also have the percipient witnesses, who were senders or
24 recipients of these communications or participants of these
25 communications, that we can ask about specific communications

1 but the log compiles everything.

2 **THE COURT:** Somebody's going to have to be able to be
3 cross-examined by the other side to say, "Yeah, those 42,012
4 entries, that includes these silly things too"; right? That's
5 what they -- they get to make that cross-examination; and if
6 your witness is not willing to admit that, then there will be
7 some trouble with me because they've got to be honest with the
8 jury about what's in there.

9 **MS. ROBERTS:** So, Your Honor, so, first of all, I
10 just kind of want to revert back to what the log is supposed to
11 be since you asked for a recollection.

12 So your preliminary injunction order, paragraph 5, says
13 (reading):

14 "By June 23rd at noon, Waymo's counsel" -- "Uber is
15 supposed to provide Waymo's counsel and the Court
16 with a complete and chronologically organized log of
17 all oral and written communications, including
18 without limitation conferences, meetings, phone
19 calls, one-on-one conversations, texts, e-mails,
20 letters, memos, and voice mails, wherein Anthony
21 Levandowski mentioned LiDAR to any officer, director,
22 employee, agent, supplier, or consultant of
23 defendants."

24 So, Your Honor, if the log includes communications with
25 vendors, for example, that would fall squarely within what you

1 asked for, and we would like to use it in the way that you
2 asked for it. Those are all opportunities for Mr. Levandowski
3 to discuss Waymo's trade secrets.

4 In terms of a witness who will get it in, like I said, we
5 have an expert who has reviewed the log, we have the percipient
6 witnesses who communicated, and --

7 **THE COURT:** Who is that expert?

8 **MS. ROBERTS:** I believe Dr. Hesselink testified.

9 **THE COURT:** What if he gets excluded? What's next
10 then?

11 **MS. ROBERTS:** I believe Ms. Padilla also is a fact
12 witness --

13 **THE COURT:** All right.

14 **MS. ROBERTS:** -- and is likely we would certainly ask
15 her about that.

16 **THE COURT:** She's going to be able to say that, "Yes,
17 this includes some silly items too"; right?

18 Just to move this along, here's what I think. I've got to
19 make a ruling. You get to use the number and you will read or
20 the witness will read what the description was that was in that
21 order -- I'm not sure you get to say it was an order, but maybe
22 you do -- and then say whatever the number was and that Uber
23 reported that number back.

24 And then if the other side wants to bring out that, yes,
25 there were some silly things in there too that have nothing to

1 do with trade secrets, then they get the right to do that, and
2 the witness should be prepared to forthrightly answer those
3 points.

4 This one will -- this is not a major point. You've got
5 to -- so, please, please, that's it. Okay? No more on that
6 one.

7 Now, we go to defendants want to exclude as unduly
8 prejudicial certain financial information that relates to
9 Waymo's damages theory. This relates to Wagner.

10 All right. I'll deal with that in the Wagner order.

11 All right. Next, defendants want to exclude evidence of
12 Levandowski's downloading of 14,000 files. I've already ruled
13 on that. We're not going to -- that comes into evidence.

14 Next, *Daubert* motion re Hesselink. All right. This one
15 we may need to spend some time on.

16 Who's going to argue this?

17 So help me understand your main points. And, please, I've
18 got to stress to both sides -- both sides -- please don't give
19 me a half-truth. I need to understand the whole truth. So
20 help me understand why Hesselink should be excluded here or not
21 excluded.

22 Please go ahead.

23 **MR. CHATTERJEE:** Okay, Your Honor.

24 With Dr. Hesselink, this is the expert that Your Honor
25 previously described at the summary judgment hearing before and

1 had serious questions as to his methodologies. I won't restate
2 the verbiage Your Honor used, but we have a narrow *Daubert* here
3 on paragraphs 65 to 72 of his expert report.

4 And what Dr. Hesselink is talking about there is
5 essentially the trade secret level protections around the SVN
6 server, and he basically parrots the language of a witness on
7 the preliminary injunction, Michael Janosko, and he also talks
8 about protections that are unrelated to the SVN server in
9 trying to pursue his theory of why there are substantial
10 protections around the SVN server.

11 He never tried to access it himself. He never tried to
12 use it. He never looked at an access log. He never
13 independently tried to verify how it worked.

14 And, in fact, Mr. Janosko, when he was deposed about it,
15 he pointed the finger back at Mr. Zbrozek. Dr. Hesselink never
16 talked to Mr. Zbrozek. He never talked to an SVN
17 administrator.

18 **THE COURT:** Wait a minute. Is that Sasha?

19 **MR. CHATTERJEE:** Sasha, yes.

20 **THE COURT:** All right. So what did Janosko say in
21 his original declaration? Help me out. Let's go back to that
22 point.

23 **MR. CHATTERJEE:** What Mr. Janosko said in his
24 original declaration was, he said that there were substantial
25 protections associated with the SVN server; such as,

1 communications to and from the server are encrypted. He said
2 that the access controls were regularly monitored and purged
3 for people who no longer should have access to it, and
4 information such as that.

5 When he was questioned in deposition about those issues,
6 he actually disclaimed any knowledge of that. He said, "Well,
7 I learned of anything that I said in my declaration from
8 Mr. Sasha Zbrozek."

9 **THE COURT:** And he put something into the
10 U.S. District Court under oath saying he had personal knowledge
11 but he did not have personal knowledge?

12 **MR. CHATTERJEE:** Yes, Your Honor, that's a very
13 significant issue from our perspective, and we learned that in
14 his deposition.

15 **THE COURT:** Did he say in his declaration that it was
16 on information and belief or --

17 **MR. CHATTERJEE:** My recollection, Your Honor, is that
18 he put it in based on his personal knowledge, but I cannot say
19 that for certain because I didn't review the declaration.

20 **THE COURT:** Can somebody show me that declaration?
21 Well, maybe --

22 **MR. PERLSON:** I have a copy of it, Your Honor.

23 **THE COURT:** -- you know the answer.

24 Did he qualify it with information and belief?

25 **MR. PERLSON:** It doesn't say on information and

1 belief, Your Honor. This was the --

2 **THE COURT:** Well, is it true, then, that it was on
3 information and belief?

4 **MR. PERLSON:** Well, it is from the communications he
5 had with Mr. Zbrozek, that's true.

6 **THE COURT:** That's hearsay, isn't it?

7 **MR. PERLSON:** Well, he also went and they deposed him
8 on -- back in March, and he said then, as he repeated in his
9 recent deposition, that he also went and personally looked at,
10 you know, the screen shots from the SVN server to verify these
11 statements.

12 So, for example, in his deposition, this was recently on
13 August 25th, said (reading):

14 **"QUESTION:** Did you have any independent
15 knowledge of your own aside from what he told
16 you?

17 **"ANSWER:** No. I'm sorry. I verified his
18 information.

19 **"QUESTION:** What did you do to verify his
20 information?

21 **"ANSWER:** I looked at change logs for
22 reviewing active users. So one of the
23 controls is that they review the user list
24 for appropriateness and I saw the process in
25 action.

1 "I also saw the configuration of a client's service
2 for subversion where you actually -- where you have
3 to enter the user name and password, and that
4 actually is encrypted.

5 "And I am also aware that users that don't have
6 authorized access to the service are not permitted to
7 access it."

8 And this is on -- I think this was cited in our brief, but
9 it's on page 17 of that deposition.

10 And I don't think it's in the papers, but I think he
11 said -- Mr. Janosko said something similar at his deposition
12 when they asked him these same sorts of questions. And it
13 was -- and also in that deposition, when they asked who is the
14 administrator, he pointed back to Mr. Zbrozek.

15 So he had discussions with -- and the issue here really
16 should be whether the information that's being relied upon is
17 reliable. And the declaration, you know, notes that -- none of
18 the facts that are actually in the declaration are disputed.
19 They don't dispute any of those facts, and they're just saying
20 that he was told those facts by someone else, which he then
21 later verified.

22 And so there's no dispute that what we're actually talking
23 about is the correct manner in which the SVN server works. So
24 this really -- there's no legitimate reliability issue here.

25 And I'll also note just -- and just so that it doesn't get

1 lost here, because I think it does get lost in their motion, is
2 that he didn't only rely on, first of all, on Mr. Janosko in
3 relation to the SVN server. He also cited Mr. Droz's
4 declaration.

5 **THE COURT:** Why does he even get into this anyway?
6 Why is the expert Hesselink getting into this?

7 **MR. PERLSON:** Well, this is -- and this is -- and as
8 Mr. Chatterjee said, this is a pretty narrow aspect of his
9 report, but one of the things that he goes into in his report
10 is, you know, that Waymo takes reasonable measures to ensure
11 people protect its trade secrets.

12 **THE COURT:** But he doesn't have any firsthand
13 knowledge. He's just basing it upon something that's hearsay
14 from Janosko.

15 **MR. PERLSON:** Well, but that's what, I mean, experts
16 do based on their --

17 **THE COURT:** No, they don't.

18 **MR. PERLSON:** Well, it's not just hearsay.

19 **THE COURT:** Not in this court. Not in this court.
20 Here's what happens in this court.

21 Well, first, I want to back up. I practiced for 25 years
22 and over those 25 years before I got this job, lawyers realized
23 it was easier to go pay some expert to say anything that you
24 thought could fly than it was to go out and find a fact witness
25 who would actually testify to it.

1 So instead of bringing in Sasha to testify to this, now
2 you want to pay some expert to glide over all that and to say
3 it. Well, I don't buy that.

4 I think it's in the Court's discretion whether to let an
5 expert or any opinion under Rule 702/703 to be -- rely upon
6 hearsay. And sometimes I allow it when I think it's not in
7 controversy. Sometimes I don't allow it when I think we ought
8 to hear the actual firsthand fact witnesses and let them.

9 So maybe one solution here seems to be is you call
10 Sasha -- you -- to testify about how this SVN got protected up
11 and down and left and right; and then whenever Mr. Hesselink
12 comes along, all he's got to do is say, "I listened to what
13 Sasha said and based on that, I think they took reasonable
14 procedures."

15 To me, that would be fine if you were going to do that.
16 If what you're trying to do is because Sasha won't support you
17 and Sasha has gone off the reservation and Sasha is now
18 stabbing you in the back and you don't want to call him anymore
19 and you're trying to get the expert to paper over it, no. I
20 don't like that.

21 So can't you just call Sasha and fix this problem?

22 **MR. PERLSON:** I understand, Your Honor, and I take
23 that under advisement and understand.

24 And just to be clear, I mean, that's essentially what
25 we're trying to accomplish here is saying that this is what

1 they've done and this is reasonable.

2 And I also want to say just two things -- or another thing
3 first.

4 The SVN server is just one portion of the reasonable
5 measures opinion that Mr. Hesselink has brought. There's --
6 additionally he goes into other measures taken, such as, you
7 know, other places at Google.

8 The SVN server is obviously just one place where this
9 stuff was, but there's all sorts of Waymo confidential
10 information that people use on a day-to-day basis, and so he
11 also addresses some of that stuff; and that is what the
12 majority of Mr. Janosko's deposition is -- or, I mean,
13 declaration is, and they have challenged none of that as
14 hearsay.

15 So the notion that, you know, it's all about the SVN
16 server and that's the only thing that's relevant here
17 misrepresents both Mr. Hesselink's opinion, as well as
18 Mr. Janosko's deposition -- declaration.

19 **THE COURT:** All right. Let me ask the other side.

20 Mr. Chatterjee, what do you think about my approach that
21 Sasha comes in, testifies about the SVN and all the safeguards,
22 and then Hesselink can come in and say, "Well, that all is
23 reasonable and that's why it's a trade secret"?

24 **MR. CHATTERJEE:** So, Your Honor, I think that there
25 are two issues there. One, even today they have not put Sasha

1 Zbrozek on their Rule 26 disclosure.

2 **THE COURT:** Yeah, but you know all about him so
3 that's fine.

4 **MR. CHATTERJEE:** We do.

5 **THE COURT:** And you were complaining a minute ago,
6 they didn't -- see, you were -- oh, God.

7 Who was it was complaining that you didn't know about the
8 board? You. Okay.

9 **MR. CHATTERJEE:** The second issue is what Mr. Zbrozek
10 said or didn't say is not what he's relying upon in the
11 foundations for his opinions here.

12 **THE COURT:** This one -- I don't like letting -- major
13 fixes are out of the question but minor fixes like this, minor
14 fixes, it's okay to get -- let Sasha come in and supply if he's
15 the one that knows the real facts; and then he can give the
16 real facts and then the expert can say, "That's safe enough."

17 All right.

18 **MR. CHATTERJEE:** There are inconsistencies,
19 Your Honor.

20 **MR. PERLSON:** I will note that they have an expert on
21 the same issue, too, so --

22 **THE COURT:** I'm sure they do the same thing. I need
23 to move on. That's going to be the ruling. Sasha first.
24 Sasha lays the foundation and then Hesselink, if he's allowed
25 at all, can testify.

1 **MR. CHATTERJEE:** Thank you, Your Honor.

2 **THE COURT:** Thank you.

3 Okay. Next we go to Timmins, something about Tyco [sic].

4 What is this all about? Tyto? Who's going to argue this?

5 So you're really the one on the Waymo side who has the --

6 what is the offer of proof on what you're trying to prove up

7 here, and why does Tyto have anything to do with our case?

8 **MS. L. COOPER:** So Tyto is another one of Anthony
9 Levandowski's companies.

10 **THE COURT:** I'm sorry. Please use the microphone a
11 little bit more.

12 **MS. L. COOPER:** Tyto is another one of Anthony
13 Levandowski's companies. He owned the company through a series
14 of shell companies. The identities of those shell companies
15 are currently confidential. It's third-party information so
16 I'm not going to name them. But Tyto is a company that Uber
17 eventually acquired as part of the Uber/Otto acquisition.

18 We have quite a bit of evidence that Anthony had been
19 siphoning off Google trade secrets to Tyto for several years,
20 even before he left Google.

21 **THE COURT:** Is there one that you can vaguely name so
22 that I could -- is it one of the nine that we have in this
23 case?

24 **MS. L. COOPER:** It is. Trade Secret 90.

25 **THE COURT:** Okay. So you say Number 90 got sent to

1 Tyto, which eventually Uber acquired?

2 **MS. L. COOPER:** Correct.

3 **THE COURT:** Really? I don't think I ever knew that
4 fact before. Have you really got proof of that or is that just
5 more speculation?

6 **MS. L. COOPER:** We really have proof of that.

7 **THE COURT:** All right.

8 **MS. L. COOPER:** Even more importantly for the case is
9 Uber has pinned quite a bit of its independent development
10 story on the lead hardware engineer for Fuji. His name is
11 James Haslim. He's one of the few people that did not come via
12 Google, and they're pointing to him for independent
13 development, for example, of Trade Secret 2.

14 The fact that James Haslim came from Tyto, another Anthony
15 Levandowski company, destroys his credibility in a way because
16 he's not as clean as Uber has been arguing.

17 **THE COURT:** So remind me. Go back over the Haslim
18 résumé so that I can understand his step-by-step of how he was
19 interconnected with Levandowski. Go over that.

20 **MS. L. COOPER:** So he worked at Tyto. Through the
21 course of this case, we've learned that Anthony Levandowski
22 owned Tyto; but when Uber was acquiring Otto, Uber claims they
23 didn't know that Tyto was owned by Levandowski.

24 So from Uber's perspective, they thought they had this
25 great little LiDAR company named Tyto. There were, I think,

1 between six and eight engineers, one of whom was James Haslim.
2 He was the head LiDAR engineer. And by acquiring Tyto, they
3 got all of the technology that Tyto had.

4 **THE COURT:** Where was Tyto even located?

5 **MS. L. COOPER:** In the Bay Area somewhere.

6 **THE COURT:** In the Bay Area. Okay.

7 All right. So did it have more than one employee?

8 **MS. L. COOPER:** Six employees but the lead engineer
9 was this guy James Haslim.

10 **THE COURT:** All right. Now, did Haslim have any
11 prior contact with Levandowski?

12 **MS. L. COOPER:** Yes, he did.

13 **THE COURT:** What was that contact?

14 **MS. L. COOPER:** He -- I think he testified that
15 Levandowski was around all the time. He was giving him tech
16 briefings on the technology that Tyto was building. He didn't
17 actually know that Levandowski was connected to the company
18 through the shell companies, but he said and a number of other
19 Tyto employees said that, you know, Levandowski was around all
20 the time.

21 **THE COURT:** So prior to Haslim going to Tyto, did
22 those two know each other?

23 **MS. L. COOPER:** I don't think they did.

24 **THE COURT:** Okay. So what year was Tyto formed?

25 **MS. L. COOPER:** 2012.

1 **THE COURT:** When was Haslim hired?

2 **MS. L. COOPER:** I'm told that it's 2012 as well.

3 **THE COURT:** All right. And who was the person that
4 he interviewed with at Tyto?

5 **MS. L. COOPER:** Mr. Corredor tells me that one of the
6 people he interviewed with was Anthony, and this is while
7 Anthony was working at Google.

8 **THE COURT:** All right. Then, so you're saying that
9 Number 90 went to Tyto.

10 Okay. And then -- all right. So when did that company
11 get acquired by Uber?

12 **MS. L. COOPER:** So -- and some of this has been
13 designated by Uber, but given your advice earlier this morning,
14 I think I can --

15 **THE COURT:** Well, wait a minute. Just a second.

16 I'm going to let -- I don't think any of this deserves to
17 be under seal. This is a U.S. District Court. It's a public
18 thing. I don't see how any of this should be under seal except
19 for what the actual trade secret is, so I'm going to give you
20 permission to go ahead unless somebody wants to throw
21 themselves in front of the train.

22 **MS. L. COOPER:** So as part of Uber acquiring Otto,
23 Anthony negotiated for the acquisition of Tyto as well. So
24 when Uber agreed to acquire Otto, Uber also agreed to acquire
25 Tyto. What actually happened is before the transaction closed,

1 Otto acquired Tyto and then Uber acquired Otto and Tyto
2 together.

3 **THE COURT:** But did Uber know that this was the way
4 it was being set up?

5 **MS. L. COOPER:** That is a very good question. So far
6 they've said that they don't; but very, very senior Uber
7 executives, including Mr. Kalanick and Mr. Poetzsch, the head
8 of their corporate development department, reviewed the Tyto
9 acquisition materials and signed off on them before the
10 acquisition closed.

11 **THE COURT:** I'm sorry. Who were those people?

12 **MS. L. COOPER:** Travis Kalanick, CEO, and Cameron
13 Poetzsch. He's the head -- he's a VP in Uber's corporate
14 development department. And aside from those two, Anthony
15 Levandowski, of course, also knew.

16 **THE COURT:** But that was before he -- he was on the
17 other side of the transaction when it was being done. In other
18 words, it was Uber negotiating with Levandowski who in turn is
19 folding in Tyto to the deal it sounds like.

20 **MS. L. COOPER:** But it was after they signed the term
21 sheet.

22 **THE COURT:** All right. So -- okay. I have the
23 general picture.

24 So let me hear the other side's view of what the Tyto
25 story is.

1 **MS. DUNN:** Well, just to clear up a couple things,
2 Mr. Poetzscher will likely testify that they thought Otto was
3 going to acquire Tyto and they also were interested in
4 separately in acquiring Tyto. Ultimately Otto acquired Tyto
5 and Uber acquired Otto.

6 **THE COURT:** Who is this? Poetzscher?

7 **MS. DUNN:** Yeah.

8 **THE COURT:** Who is that?

9 **MS. DUNN:** He is the head of corporate development at
10 Uber.

11 **THE COURT:** All right.

12 **MS. DUNN:** And so to Your Honor's question, they
13 didn't know about the relationship of Anthony Levandowski to
14 this company; but what I want to make sure to be incredibly
15 clear with the Court, that this motion isn't about actually any
16 of that. This is a motion having to do with Waymo's M&A
17 expert, a gentleman by the name of Jim Timmins, who is in his
18 report offering an impermissible legal opinion. So this is
19 actually quite a narrow motion.

20 I understand the desire to tell the story, but it would
21 require discussing how Trade Secret 90 is actually in Spider,
22 which was discontinued, and more of the tech story than I
23 really --

24 **THE COURT:** What is the legal opinion? What is the
25 legal opinion that -- can you at least say that much?

1 **MS. DUNN:** Yes, I can.

2 So Mr. Timmins wants to be able to testify -- Waymo wants
3 him to be able to testify that Mr. Levandowski through a trust
4 called Bismuth Trust ultimately had control over Tyto.

5 So what we have moved to do is to exclude that opinion
6 from Mr. Timmins, who is not a lawyer and has no expertise in
7 trusts at all, because, first of all, it's an impermissible
8 legal conclusion that an expert should not be offering and then
9 also because Mr. Timmins is not qualified to give it.

10 I heard Your Honor at the beginning of the hearing say
11 that now we can maybe use AEO material. The transcript of
12 Mr. Timmins' deposition has been designated AEO, which is what
13 the parties have just been doing. It was taken yesterday. So
14 I will tell you that the deposition of Mr. Timmins strongly
15 supports our motion because he makes clear that he has no
16 experience at all in interpreting trust documents and simply
17 looked at a document about this trust and then consulted a
18 legal dictionary, and that's how he came up with his opinion.

19 So this motion is not to get into the merits of the Tyto
20 story. And to the extent the Tyto story is relevant, the issue
21 is that Waymo deposed Uber witnesses who were not aware of the
22 relationship between Mr. Levandowski and this trust to Tyto,
23 and they are concerned that that's a deficiency in their
24 evidence. So they're looking for this expert, clearly somebody
25 gave him this legal stuff to say, and then he put it in his

1 report, but it is very clear he's not an expert in this. He
2 admitted this is not what his firm does.

3 **THE COURT:** What is the -- help me understand. What
4 is the chain of ownership? Does it trace back to Levandowski?
5 What's the story there?

6 **MS. DUNN:** Mr. Levandowski is the settlor of a trust
7 but he is not the trustee of the trust, and so the trustee of
8 the trust, who's a different individual, who --

9 **THE COURT:** A relative?

10 **MS. DUNN:** No, not related.

11 -- is the trustee of the trust.

12 So nobody's disputing that if they choose to put on the
13 fact witnesses that they've deposed, that they can elicit that
14 testimony. The only issue that we are bringing, and we brought
15 it -- you know, frankly, Wagner is our main *Daubert* and we only
16 brought this because it seems so facially evident that this
17 expert, this M&A expert should not be allowed to offer this
18 legal opinion at all.

19 I think this is a minor issue in the trial potentially,
20 but as an expert opinion, this just seemed too improper to
21 not -- to not raise it.

22 **THE COURT:** All right. What do you say -- all right.
23 I understand the general Tyto story, but they're not trying to
24 knock that story out. They're trying to knock out a legal
25 opinion that he had control over Tyto. So what do you say to

1 that?

2 **MS. L. COOPER:** So a couple of things, Your Honor. I
3 think they are trying to knock the story out because they're
4 trying to prevent this story from getting to the jury in a
5 coherent way.

6 Anthony Levandowski set this chain of trusts up to be as
7 complex and as indecipherable as possible, which is not to
8 say --

9 **THE COURT:** Well, explain how it was set up.

10 **MS. L. COOPER:** So --

11 **THE COURT:** And, again, you need to move the
12 microphone closer to your voice.

13 **MS. L. COOPER:** I apologize.

14 Ms. Dunn just mentioned that Bismuth Trust is the sort of
15 top trust in the tree. The one below that is Sandstone.

16 **THE COURT:** Is what?

17 **MS. L. COOPER:** Sandstone.

18 **THE COURT:** Standstone?

19 **MS. L. COOPER:** Sandstone, S-A-N-D.

20 **THE COURT:** Sandstone. That's like what? Another
21 trust or what?

22 **MS. L. COOPER:** It's an LLC.

23 **THE COURT:** LLC. Okay.

24 **MS. L. COOPER:** Sandstone owns Tyto. So this is
25 not -- you know, Mr. Timmins is not opining on the ins and outs

1 of an extremely complex trust and talking about, like, how a
2 trust is administered on a daily basis. What he's doing is
3 following a pretty simple chain of documents. We submitted all
4 of the documents with our motion.

5 **THE COURT:** Well, why doesn't he just recite what the
6 chain of ownership is and leave out the conclusion about
7 control?

8 **MS. L. COOPER:** He can recite what the chain of
9 ownership is, but the jury is going to need help understanding
10 just some of the basic legal terms.

11 So, for example, the fact that Sandstone is the sole
12 member of Tyto means that Sandstone controls Tyto. That's what
13 that means. That's the level of testimony we're expecting from
14 Mr. Timmins.

15 The fact that Anthony Levandowski is the settlor of
16 Bismuth, which is sort of the top trust in the tree, means that
17 he has the power to control what goes on in the entities below.

18 **THE COURT:** A settlor, is that really true? I
19 thought the settlor does not get to control. They're just the
20 person who puts in the money, and it's the trustee that
21 controls.

22 **MS. L. COOPER:** He's settlor and substituter, which
23 means he can move assets in and out and swap them for equal
24 value.

25 **THE COURT:** Yeah, but that's still not the same thing

1 as being the trustee.

2 **MS. L. COOPER:** As substituter, you can direct the
3 trustee. The trustee is a different trust called the Alaska
4 Trust Company, and he -- I know he can direct them because he
5 has done it. He directed Sandstone to acquire Tyto.

6 **THE COURT:** Have you seen that paperwork?

7 **MS. L. COOPER:** Yep. We attached it to our
8 opposition.

9 **THE COURT:** So is that true, that Levandowski
10 directed the trustee to acquire Tyto?

11 **MS. DUNN:** Your Honor, I don't know the answer to
12 that question. I know that this is a *Daubert* motion, and the
13 standard for the *Daubert* is not what Anthony Levandowski did.
14 The standard is whether Mr. Timmins, who's not a lawyer, has no
15 experience in trusts, whose firm doesn't do anything with
16 trusts, read these documents and consulted a legal dictionary
17 is a competent expert to testify on this and he isn't.

18 And Ms. Cooper just said, the jury needs help with legal
19 conclusions. He's just not allowed to do that.

20 If she has these documents into evidence, they're
21 perfectly able to show those documents to the jury, but an
22 M & A expert who has no experience in trusts and admitted as
23 much in deposition really should not be permitted to help the
24 jury analyze them from a legal perspective.

25 **MS. L. COOPER:** If I could respond to that.

1 So all of the cases defendant cited about experts opining
2 on ultimate legal conclusions, they were cases like, for
3 example, a breach of contract case where somebody called an
4 expert to talk about the interpretation of the contract where
5 that was the ultimate legal issue in the case.

6 This is the complete opposite. This is not the ultimate
7 legal issue in the case. It's, like, an adjacent fact and no
8 one even disputes it. They don't claim that Mr. Timmins'
9 interpretation of these documents is wrong. They just want to
10 prevent him from explaining them to the jury.

11 **THE COURT:** What is it -- but what is his
12 qualification to analyze these documents?

13 **MS. L. COOPER:** He's spent 35 years working on M & A
14 deals. He works on corporate formation documents, corporate
15 control documents, all the time. In every --

16 **THE COURT:** A corporation is not the same as a trust.

17 **MS. L. COOPER:** But, again, he's not opining on the
18 administration of a trust or how it works, or anything like
19 that. What he's doing is looking at a chain of control and
20 seeing where it ends, and in his work he does that every day.
21 In any deal you want to know who has the ultimate authority in
22 this company or, as part of this transaction, who am I working
23 with.

24 **THE COURT:** When was this deposition taken?

25 **MS. DUNN:** It was yesterday, Your Honor, and we'd be

1 happy to submit as a supplement the relevant excerpts of his
2 deposition. I think it makes very clear that his involvement
3 with trusts is pretty much limited to personal experience where
4 his brother asked him to perhaps sign some paperwork for a
5 Canadian trust, his brother being an attorney having to do with
6 his family. Other than that --

7 **THE COURT:** All right. Both sides can submit by
8 tomorrow -- is that enough time? Tomorrow?

9 **MS. L. COOPER:** Sure. Yeah.

10 **THE COURT:** By tomorrow submit any supplement,
11 including any supplemental brief, you want on Mr. Timmins.

12 **MS. DUNN:** I assume Your Honor wants a page limit on
13 that.

14 **THE COURT:** Five pages.

15 **MS. DUNN:** Wow.

16 **THE COURT:** Okay. But is Haslim going to be a
17 witness?

18 **MS. L. COOPER:** Yes, almost undoubtedly, but Ms. Dunn
19 can confirm.

20 **MR. JACOBS:** Yes, that's correct.

21 **MS. DUNN:** Yes, he is going to be a witness and these
22 documents will be in evidence, so to have --

23 **THE COURT:** I want to make it very clear, it would be
24 fair game when he's on the stand to bring out this relationship
25 and the fact that he did not disclose it whenever he submitted

1 his declaration.

2 **MS. L. COOPER:** Your Honor, just to add to that,
3 Mr. Haslim is not the only one at Uber who should have known
4 about it. A number of the administrators of Levandowski's
5 trust companies currently work at Uber; and, as I said before,
6 the Tyto acquisition --

7 **THE COURT:** But did they submit declarations?

8 **MS. L. COOPER:** Not that I know of, but --

9 **THE COURT:** I don't know. I'm not going to get into
10 other people. I'm just going to say I placed a lot of weight
11 on Haslim's testimony before, and I might not have if I had --
12 to violate my own rule -- if I had known that he was a
13 long-time buddy of Levandowski.

14 **MS. DUNN:** So because we've gotten into the facts, my
15 understanding is Haslim got to Tyto through a different person
16 named Brent Schwartz. We can talk about that, but --

17 **THE COURT:** Well, if he didn't know, he didn't
18 know --

19 **MS. DUNN:** Right. But I think --

20 **THE COURT:** -- but the other side says he knew good
21 and well that Levandowski was behind the scheme.

22 **MS. DUNN:** Well, let me -- then if that's the
23 take-away, then I should be incredibly clear that the reason
24 they want this expert, who's totally unqualified to say this,
25 is because at Uber people did not know. And they have deposed

1 all the witnesses they could find on this, and the problem is
2 they did not know.

3 **THE COURT:** But Haslim knew.

4 **MS. DUNN:** I don't -- that is not the case.

5 **THE COURT:** Well --

6 **MS. DUNN:** So --

7 **THE COURT:** They say he knew.

8 **MS. DUNN:** I understand what they say, and Mr. Jacobs
9 has been working closely with Mr. Haslim so should say that,
10 but --

11 **THE COURT:** All right.

12 **MR. JACOBS:** I just wouldn't prejudge this,
13 Your Honor. The Tyto story has emerged in the course of the
14 litigation. Facts have emerged that have been new facts for a
15 lot of people in this case, both lawyers who worked on
16 acquisitions. I just wouldn't prejudge it and let's see what
17 happens.

18 **THE COURT:** I'm not. I'm not. But they are saying
19 they can show that Levandowski was the one that interviewed him
20 for the job.

21 Now, are you really sure of that fact? Now you're looking
22 back --

23 **MS. L. COOPER:** Mr. Corredor is going to come and
24 confirm.

25 **MR. CORREDOR:** Your Honor, Mr. Haslim --

1 **THE COURT:** Your name again.

2 **MR. CORREDOR:** I'm Mr. Corredor.

3 **THE COURT:** Yes.

4 **MR. CORREDOR:** Your Honor, Mr. Haslim was very
5 reluctant to use the word "interview" when he was testifying
6 about these facts; but he said that when he was looking for a
7 job at Tyto, Levandowski happened to be there and asked him
8 some questions and talked to him, among other people.

9 **THE COURT:** He happened to be at Tyto?

10 **MR. CORREDOR:** Yes.

11 **THE COURT:** On the premises?

12 **MR. CORREDOR:** Yes, when Haslim was interviewing
13 there.

14 **THE COURT:** And asked him some questions?

15 **MR. CORREDOR:** Yes.

16 **THE COURT:** Well, was it under circumstances that
17 would suggest that Levandowski was connected with management of
18 Tyto?

19 **MR. CORREDOR:** Yes. Haslim was interviewing with
20 other people as well, with Brent Schwartz, I believe, perhaps
21 others.

22 **THE COURT:** All right.

23 **MS. DUNN:** Your Honor, in the interest of judicial
24 efficiency, my question about the supplement that we will
25 submit, our recommendation or thought would be that it be

1 actually targeted to this *Daubert* issue, which is what our
2 original motion is about, as opposed to a broad adjudication of
3 the Tyto story.

4 **THE COURT:** It should be targeted, but I won't limit
5 people to other things -- I mean, exclude other possibilities;
6 but that is the main issue, you're right.

7 **MS. DUNN:** Thank you, Your Honor.

8 **THE COURT:** Okay. The issue on Wagner we've already
9 addressed. So now we're going to move to the -- let's go to
10 social media for a minute.

11 What I plan to say to the jury based on your -- to the
12 *venire*, not to the jury -- to the jury of course, but to the
13 broader *venire*, is that these excellent lawyers -- well, first
14 I'll start by saying how important it is that they not Google
15 the case or the lawyers or do any homework of that type. I'll
16 say that repeatedly through the trial.

17 But when I say it at the initial stage, I will say and
18 just to underscore that the lawyers have agreed that they will
19 not Google information about the potential members of the jury
20 out of respect for their privacy and in order to encourage them
21 to abide by the admonition not to -- the jury not to Google
22 anything about the case.

23 And I understand that both sides now are in total
24 agreement with that. Am I correct?

25 **MR. GONZALEZ:** Yes.

1 **MR. EISEMAN:** Yes, Your Honor. We filed a joint
2 submission.

3 **THE COURT:** Yes, I saw that. Okay. So that part's
4 good.

5 Now, you wanted -- I don't know if you each get an hour
6 for *voir dire*, but I will give each side 45 minutes for
7 *voir dire*; and if you need it, and I can tell when you really
8 need it, I'll give you more. I might even give you more than
9 an hour, like if circumstances warranted it, but 45 minutes I
10 think will be enough.

11 I will ask questions myself. I just want -- I don't know.
12 All the people out there, any members of the press out there or
13 public, or is everybody connected with the case? So we've got
14 a few people.

15 It will be an interesting thing for the public to
16 observe -- and I'm not preguessing this -- which side knocks
17 off the potential jurors who have any technical engineering or
18 scientific ability. Pay attention to that. I find -- I've
19 seen over 18 years, it's usually one side or the other does not
20 want anyone who could have an easy way to understand the case.

21 So, please -- it's okay. It's your God-given right in
22 this country to do exactly that when you're picking a jury, but
23 I find it to be one of the more interesting features of jury
24 trials and one that's often and almost always overlooked by the
25 press. So think about that as you hear the *voir dire*.

1 I will conduct most of the *voir dire*, but I am going to
2 give you at least 45 minutes per side. What you cannot do is
3 try to condition the jury. If you do that, I'm going to
4 interrupt. Please don't do that.

5 The purpose of *voir dire* is to find out if there are any
6 life experiences that might prejudice them against you, like,
7 for example, if somebody had come up with a trade secret and
8 somebody stole it from them and they had to go sue and they
9 went through the -- you know, that person might be -- not
10 automatically but they might be biased in this case.

11 So that would be -- you know, that's the kind of thing you
12 want to be trying to get at and not say, "Well, if we in this
13 case prove that Mr. Levandowski did A and did B and then C,
14 would you rule for us?" No, you can't do that. That's not
15 proper.

16 Okay. We wanted -- did we need to have a discussion on
17 the ground rules -- oh, on the ground rules for Levandowski? I
18 am not going to let you call Levandowski -- this is a close
19 call whether to let him be examined under -- in front of the
20 jury and have him invoke the Fifth Amendment anyway.

21 Does he have a lawyer here today? He may want to be heard
22 on this. I guess not.

23 So I am not going to let you call him early in the case
24 until I hear that the jury has already heard corroborating
25 evidence. The jury has heard it. So you need to have that in

1 mind.

2 Now, you don't have to call him as your absolute last
3 witness, but you need to call him toward the end so that you
4 could lay the corroborating evidence.

5 All right. Go ahead.

6 **MR. VERHOEVEN:** Your Honor, we submitted a submission
7 on that, but just to quickly cover it, there is no
8 corroboration requirement for eliciting testimony where the
9 witness takes the Fifth. The corroboration requirement is only
10 relevant to whether the Court instructs the jury with respect
11 to the inference.

12 And so corroboration evidence could come --

13 **THE COURT:** Well, but isn't that the whole point? I
14 mean, the inference?

15 **MR. VERHOEVEN:** No. I mean, we could call him
16 without the Court instructing the jury about the inference, and
17 we'd have every right to call him just like any other witness,
18 so --

19 **THE COURT:** No, you don't. You don't have a right to
20 do that. That's not true. It's a waste of time to call him
21 unless the jury can draw an adverse inference. I don't see
22 that.

23 **MR. VERHOEVEN:** Well, I think -- I'd have to go back
24 and look at the case law, Your Honor, but I think that there's
25 a distinction between drawing an adverse inference and having a

1 witness testify who takes the Fifth.

2 The inference would be something that the Court would do
3 in addition to that, telling the jury they could infer that --
4 from that testimony that -- whatever the Court decides to say
5 in the instruction; whereas, the testimony itself would just be
6 similar to calling somebody else.

7 And in addition to that, Your Honor --

8 **THE COURT:** Yeah, but what's the point? You know
9 he's going to take the Fifth Amendment. You know he's going to
10 take the Fifth Amendment.

11 **MR. VERHOEVEN:** He's a witness.

12 **THE COURT:** It's just to make him look bad.

13 **MR. VERHOEVEN:** He's here. He's available. We would
14 call him just like we call any other witness, Your Honor.

15 **THE COURT:** No, you can't. I think there are lots of
16 cases where the decisions say in those circumstances the judge
17 can just exclude that witness totally and the jury never sees
18 him at all. So I don't agree with your legal theory.

19 All right. Is that it?

20 **MR. VERHOEVEN:** That's it. In the interest of time,
21 I won't bother the Court anymore.

22 **THE COURT:** All right. Good.

23 **MR. VERHOEVEN:** Well, so on the opening, maybe we can
24 get some guidance. So we're not allowed -- we can obviously
25 refer to Mr. Levandowski in our opening statements; correct?

1 **THE COURT:** Just a second.

2 (Pause in proceedings.)

3 **THE COURT:** I'm sorry.

4 **MR. VERHOEVEN:** I think the order says --

5 **THE COURT:** Of course, you have to refer to
6 Levandowski. He's the guy who allegedly stole everything, but
7 do you need to refer to the fact that you're going to call him
8 and he's going to take the Fifth Amendment?

9 **MR. VERHOEVEN:** I think we should be able to.

10 **THE COURT:** I don't know. I think we should wait on
11 that. I think there's no prejudice to you really, or minor
12 prejudice, in waiting. I think you just lay out your case.

13 **MR. VERHOEVEN:** Well, perhaps -- what we're concerned
14 about in addition to case management and explaining the whole
15 story to the jury in the opening of what we're going to
16 present, in addition to those things, we're concerned -- he's a
17 big witness in this case and we're concerned that the jury is
18 going to be, like, "What's going on?" The same thing we talked
19 about about them arguing there's an empty seat.

20 **THE COURT:** But you're not going to be giving a
21 preview of every witness that you're going to call. You're
22 going to be laying out here's the story of what happened, and
23 it will just pass right over their heads that you're not
24 calling him out as a particular witness.

25 **MR. VERHOEVEN:** Well, the point of the opening is to

1 tell what evidence is going to come in and what it's going to
2 show as a summary for the jury so they understand what's coming
3 in.

4 **THE COURT:** Yeah, but the way you're going to tell
5 the story, you're not going to say "Witness X is going to say
6 Y. Witness A is going to say B." I mean, you can do it that
7 way. That is a permissible way to do it, but that's not the
8 way you lawyers typically do it. You come in with a dramatic
9 story on the day he's about to leave his employment, you paint
10 this picture of him downloading, pushing the buttons, the card
11 reader is buzzing, and you don't even mention that he's going
12 to testify or not testify. It's "This is the story we're going
13 to prove to you," and so I don't think you're very prejudiced
14 by --

15 **MR. VERHOEVEN:** Your Honor --

16 **THE COURT:** Let me hear from the other side first.
17 Do you care whether they get to say that he's going to
18 come and take the Fifth Amendment?

19 **MS. DUNN:** Yes, we care very much.

20 **THE COURT:** Why is that? That's probably going to
21 happen, so why not just go ahead and let the jury know?

22 **MS. DUNN:** Well, first of all, as Your Honor just
23 said, it is a fairly hard call and a big decision for the Court
24 to decide that he is coming to court to invoke, and there are,
25 you know, many decisions where courts struggle with that very

1 decision.

2 And as you just said, he probably will, but that will
3 depend on Your Honor's decision, and the questions he is asked
4 will depend on whether there's independent corroborating
5 evidence for those questions to be asked.

6 And so Your Honor has already stated what I would have
7 stated, which is that this is -- with such a -- such a big
8 thing happen in this case, it is prudent and consistent with
9 the case law to proceed as Your Honor has already ordered you
10 will proceed, and we think that's right. We think it's
11 consistent with the law, and we think that we need to see the
12 evidence that comes out in this trial before we know what
13 questions will be posed to Mr. Levandowski and whether the
14 Court, in fact, will allow him to come.

15 **THE COURT:** Well, that's all true, but the -- I'm not
16 talking about giving the other side permission to say the
17 specific questions that would be asked but, rather, to say --
18 Mr. Verhoeven wants to say, "And, yes, we're going to bring him
19 in here. Yes, we're going to bring him in. We're going to put
20 him right up here on this stand. And you know what? He's
21 going to take the Fifth Amendment." Then he'll say the
22 Fifth Amendment, that that's a dirty word, and that's what's
23 going to happen.

24 **MS. DUNN:** Yes. Well, we think that's
25 extraordinarily prejudicial to us --

1 **THE COURT:** Well, I don't know.

2 **MS. DUNN:** -- and it's not --

3 **THE COURT:** It's 99 percent likely to happen.

4 **MR. VERHOEVEN:** It's a fact.

5 **THE COURT:** Why is that so prejudicial to say it's
6 going to happen in the opening?

7 **MR. VERHOEVEN:** I just add, Your Honor, I'm going off
8 my recollection, but my recollection is that Uber itself
9 proposed addressing the Fifth Amendment in their *voir dire*. So
10 I don't understand why suddenly they --

11 **THE COURT:** That's a good point. Are you going to do
12 that?

13 **MS. DUNN:** I'm sorry. I did not hear.

14 **THE COURT:** In your *voir dire* to the jury, are we
15 supposed to cover how they're going to react to the
16 Fifth Amendment and all that? I think you've got that in your
17 *voir dire*.

18 **MR. VERHOEVEN:** I've got their supplemental proposed
19 *voir dire*.

20 **MR. GONZALEZ:** Your Honor, it's all going to be
21 dependent on what the Court decides. Obviously if
22 Mr. Levandowski never testified, there would be no such
23 question, but --

24 **THE COURT:** Wait. But how are you going to know that
25 at the time of *voir dire*?

1 **MR. GONZALEZ:** Well, at the time --

2 **THE COURT:** Do you have a crystal ball that --

3 **MR. GONZALEZ:** At the time of *voir dire*, Your Honor,
4 we may have an idea as to whether the Court is inclined to have
5 him come in at all.

6 **THE COURT:** No, that's not true. Right now it's
7 99 percent yes, but I've got to hear the foundation for the
8 corroboration before I let somebody ask questions that would be
9 unfair.

10 **MR. GONZALEZ:** And so there's nothing wrong with the
11 *voir dire*. The *voir dire* wouldn't refer to him at all. It
12 would just say "If a witness should invoke the Fifth Amendment,
13 do you have any views on that?"

14 Generally speaking, that's information we should be
15 entitled to know. If there's somebody in that box that
16 believes that, you know, invoking the Fifth Amendment means
17 you're guilty and don't believe anything the person says and
18 everybody's a crook who's connected to that person, we need to
19 know that.

20 **THE COURT:** Well, but -- no, that's in a criminal
21 case. In a civil case they are entitled to draw an adverse
22 inference, so it would be wrong to say to them that they can't
23 do that.

24 **MR. GONZALEZ:** I'm not going to suggest one way or
25 the other, Your Honor, whether they can do it. It's just

1 understanding the way they think. There are some people who
2 think the minute they walk into a criminal case "What did the
3 guy do? He must have done something or he wouldn't be here."

4 This is the mentality that some people bring into a civil
5 case as well when there's an invocation of the Fifth Amendment.
6 "Boy, they must have done something really bad, otherwise they
7 wouldn't be asserting the Fifth Amendment."

8 **THE COURT:** Here's what we're going to do. We're
9 going to see how -- I'm not going to give you an answer now.
10 We're going to see how the lawyers handle the *voir dire* and
11 what comes out on *voir dire*; and by that point it just may be a
12 foregone conclusion that you get to bring it up and name him by
13 name. Maybe not, though. We'll see.

14 Right now I'm not going to decide how you treat it in the
15 opening statements, but remind me that we have this hanging
16 issue. Okay?

17 **MR. VERHOEVEN:** Yes, Your Honor.

18 **THE COURT:** All right. So I don't have anything more
19 on *motions in limine*.

20 **MR. VERHOEVEN:** I apologize, Your Honor. Did you
21 give us a time for -- time period for opening statements? You
22 may have.

23 **THE COURT:** I'm going to give you all that in a
24 minute.

25 **MR. VERHOEVEN:** Okay.

1 a design -- what you design to versus whether or not something
2 falls within it, and I don't -- I didn't -- my antenna went up
3 when I read that, but we've got the public here now. We won't
4 go through that. We'll do that at some other time.

5 Okay. On page 4 Uber says -- this is not secret; I can
6 read this out loud -- this is around line 8 (reading):

7 "Waymo did not plead a claim based on disclosure of
8 the alleged trade secrets and should not be permitted
9 to advance such a claim at trial."

10 So let's hear -- who's going to argue? I want to hear --
11 I may not decide this now, but I would like to understand this
12 better. So let's have -- first I want to hear from Uber.

13 Somebody over there needs to help me understand what
14 you're saying here. Are you focusing on the word "disclosure"?
15 And what was -- and I do -- by the way, I think I have the
16 complaint here somewhere so I can actually look back and see
17 what was pled.

18 Ms. Dunn, are you going to argue this?

19 (Counsel conferring.)

20 **THE COURT:** I didn't mean to catch you unaware. I
21 could pass it if you are not ready.

22 **MR. GONZALEZ:** Your Honor, I believe that their case
23 is based on use by Uber.

24 **THE COURT:** Well, do you believe or do you know? I
25 can't go with "believe." So I got the first amended complaint

1 here, and I'd prefer to get to the bottom of it, but let me
2 just start with the other side then.

3 Do you -- they're saying that you did not make a claim
4 based on disclosure.

5 **MR. EISEMAN:** Your Honor, looking at both the first
6 and second causes of action, our first one under the DTSA and
7 our second one under the California Uniform Trade Secret Act,
8 we allege misappropriation but we're not specific. The statute
9 covers both wrongful acquisition, wrongful use, and wrongful
10 disclosure, and so disclosure would fall within the ambit of
11 our pleading.

12 **THE COURT:** Is "misappropriation" defined to mean any
13 of those three?

14 **MR. EISEMAN:** It is, Your Honor.

15 **THE COURT:** All right. So is that true? And if
16 that's true, why are you making this point?

17 **MR. GONZALEZ:** Your Honor, I believe that the
18 interrogatory responses and everything else we've gotten from
19 them, including their original Rule 26 disclosure, talked about
20 use. The case has not been about Uber received a secret and
21 then disclosed it to some third party. That has not been their
22 case.

23 **MR. EISEMAN:** Your Honor, I'm sure that Mr. Gonzalez
24 will correct me if I'm wrong, but I believe that all of their
25 interrogatories in this case were directed to use. They didn't

1 ever ask us about disclosure. And so to the extent that
2 they're focusing on our interrogatory responses, we truthfully
3 answered those because they were focused on use.

4 **THE COURT:** Who is your -- okay. So you're saying
5 Uber disclosed to somebody?

6 **MR. EISEMAN:** We have several theories of disclosure,
7 and part of this is --

8 **THE COURT:** Well, give me one. Just give me one, so
9 that I can --

10 **MR. EISEMAN:** One is that Mr. Levandowski, who was an
11 agent of Otto Trucking, disclosed trade secrets to Uber; and so
12 Otto Trucking --

13 **THE COURT:** All right. Well, that's clearly in the
14 case.

15 All right. What's your next theory?

16 **MR. EISEMAN:** Well, also Mr. Levandowski in the
17 course and scope of his employment by Ottomotto or his
18 relationship with Ottomotto disclosed to Uber. So that would
19 be another example.

20 **THE COURT:** To Uber?

21 **MR. EISEMAN:** Yes.

22 **THE COURT:** But is there a to somebody else? You
23 know, like --

24 **MR. EISEMAN:** Sitting here --

25 **THE COURT:** -- Gorilla Company?

1 **MR. EISEMAN:** Sitting here right now, we don't have
2 any allegations. But, as Your Honor knows, there are
3 depositions still going on in the case based on the Stroz
4 report, and so I would ask Your Honor not to prejudge that
5 issue and we can decide it once discovery is done. We're happy
6 to make an offer of proof, and we can make that decision at
7 that point.

8 **THE COURT:** All right. Okay. I'm not going to rule
9 on this. I was just trying to understand what the issue was.

10 All right. Down at the bottom of that page it says the
11 following (reading):

12 "Waymo is not entitled to present any reasonable
13 royalty evidence to the jury because a reasonable
14 royalty, if any, should be determined by the Court."

15 Now, in the patent cases at least the jury determines
16 reasonable royalty all the time. So I don't get it. Where
17 does this law come from that the judge is supposed to determine
18 that versus the jury?

19 **MR. GONZALEZ:** Your Honor, it's right out of the
20 California Trade Secrets Act, that reasonable royalty, if it's
21 to be awarded at all, is to be awarded by the Court.

22 **THE COURT:** Is that the same under the federal act
23 too?

24 **MR. EISEMAN:** It's not, Your Honor.

25 **THE COURT:** Okay. Wait. Hang on. Finish your

1 point.

2 **MR. GONZALEZ:** Your Honor, I believe that the law is
3 not as clear under federal law, and we have some jury
4 instructions on this point that address the issue; but under
5 federal law, my understanding is that a reasonable royalty can
6 be in lieu of unjust enrichment.

7 **THE COURT:** But who decides that? The jury or the
8 judge under federal law?

9 **MR. GONZALEZ:** I think, Your Honor, that's the
10 uncertainty, is that the federal law --

11 **THE COURT:** So you say it's uncertain.

12 What do you say?

13 **MR. EISEMAN:** The one case tried to a jury under the
14 DTSA, it's an Eastern District of Pennsylvania case, the jury
15 decided reasonable royalty in that case.

16 **THE COURT:** Well, it might have been by consent
17 there. Both sides might have consented to that.

18 **MR. EISEMAN:** Well, the legislative history of the
19 statute, Your Honor, we believe supports a jury trial.

20 And what we think ought to happen here is they're right in
21 terms of the California statute, but the jury should hear the
22 reasonable royalty issue under the DTSA; and we think that it
23 makes sense to have the jury then render a decision on royalty
24 under the California statute and it can be advisory to
25 Your Honor, and then you'll take it from there.

1 **THE COURT:** All right. I now understand that better.
2 Okay. Let's go over the number of jurors. I'm
3 thinking -- now, the other day -- I want -- the other day,
4 Mr. Verhoeven, you said that this was a two-week trial. That's
5 what you said.

6 **MR. VERHOEVEN:** I said I could do a trial in December
7 in two weeks if you'll give it to me. I could still do it in
8 two weeks if you order me to.

9 **THE COURT:** Well, no. But, see, then you'll go to
10 the Court of Appeals and say that I ordered you to do
11 something.

12 **MR. VERHOEVEN:** No, I would not do that, Your Honor.

13 **THE COURT:** Yes, you would. And so I -- but --

14 **MR. VERHOEVEN:** They wouldn't pay any attention if I
15 did. That's your discretion, Your Honor.

16 **THE COURT:** Well, here's what I -- my own view --
17 look it, do you know how many witnesses you-all listed and how
18 many documents you listed? And even if only 10 percent gets
19 into evidence, it's more than a two-week trial for both sides,
20 in my view.

21 **MR. VERHOEVEN:** That's fine with me, Your Honor.

22 **THE COURT:** Now, I want to make sure you understand
23 we start here at 7:30 a.m., and I come out and I ask the
24 lawyers, I say, "How can I help the lawyers?"

25 At 7:45 while we're out here droning on, the jury is

1 accumulating in the jury room, and by 8:00 a.m. we start with
2 the evidence every day. Even if you have something more you're
3 dying to say, too bad. You get 30 minutes with me to clear up
4 problems, and then we can clear up. But then we go to
5 1:00 o'clock; two breaks, 15 minutes each; and we go to
6 1:00 o'clock and there's no lunch break.

7 So then the jury gets to go home. They're not -- the
8 juries love this system, and it's only 45 minutes to 60 minutes
9 shorter than a 9:00 to 5:00 day if you do the math because
10 there's no lunch break and we start with the evidence at
11 8:00 o'clock. So 8:00 to 1:00 is five hours, minus 30 minutes
12 is four and a half hours a day. If you do the math on a
13 9:00 to 5:00 schedule with an hour and 15 minutes for lunch,
14 it's about an hour, maybe 45 minutes longer if you really did
15 go all the way to 5:00 o'clock.

16 You don't have jurors going to sleep like they might in
17 the afternoon. So it gives you the afternoon to get prepared.

18 So this is almost a full day, but it would not be -- I
19 wouldn't claim it to be a full day, but I think it is an almost
20 full day and it is very efficient.

21 So in my view, I'm just going to give you a number that I
22 think is higher than two weeks and it would be in the 16-hour
23 range per side. So that would be 32 hours of evidence plus
24 opening, which would be in addition; plus closing, which would
25 be in addition; and then of course there's deliberations.

1 But for evidence time -- and that counts your cross. You
2 know, some lawyers think they're great on cross, so they leave
3 more time for cross. Others like to do it through direct.
4 It's up to you. You know, that's your call.

5 So 16 hours per side, then openings and then closing. I
6 promise you I don't think we could even do that in three weeks,
7 but it might be. If everything went right, we could do that in
8 three weeks from my own experience in how the lawyers use time.

9 So I'm here to hear you out on what you think the time
10 limits ought to be.

11 **MR. VERHOEVEN:** What you've suggested is fine with
12 Waymo.

13 **MR. CARMODY:** It's fine with us too, Your Honor.

14 **THE COURT:** All right. 16 hours per side.

15 How about 10 jurors? Does that work for you?

16 **MR. GONZALEZ:** That's fine, Your Honor.

17 **MR. VERHOEVEN:** Yes, Your Honor.

18 **THE COURT:** Okay.

19 All right. So --

20 **MR. CARMODY:** Your Honor, does that include two
21 alternates?

22 **THE COURT:** Well, the 10 would be -- we don't have --
23 on the civil side we don't have alternates anymore. We just
24 start with 10. If we get down to 6, then that's the minimum.
25 So we hope we don't get down to -- once we get down to 6, we're

1 in trouble. We can't lose another one, but if we -- let's say
2 we kept all 10 or we had 9, then all of them would deliberate.
3 They don't get sent home. They all deliberate.

4 You should show each other the slides that you plan to use
5 on your opening statements so that I can resolve any problems
6 up front.

7 Have you gone through -- have you seen those guidelines
8 that I use for jury trials? Have you looked at them? Do you
9 know what I'm talking about?

10 When I first got this job, the lawyers would say at these
11 conferences, "Well, Judge, how do you handle this? How do you
12 handle that?" They would ask me a dozen questions. Well, I
13 just wrote it out. So this is the way.

14 And I have procedures in there for you that help smooth
15 things out so that you know who the witnesses are that are
16 coming up, and you also -- now, there's a trick that sometimes
17 lawyers use, which is they say, "Oh, the next witnesses are
18 going to be A, B, C, and D," and then they don't call A, B, C,
19 and D -- maybe they call D, and then meanwhile the other side
20 has wasted hours of time with A, B, and C getting ready for the
21 cross.

22 So if that gets to be a problem, I may have to impose some
23 limits on you, so please don't do that trick.

24 I don't remember how I did it in the Oracle case. I might
25 have -- sometimes I put in a requirement that you have a

1 rolling list of witnesses and you -- let's say five or six, and
2 you always have to call your next witnesses from that rolling
3 list and you can't skip ahead.

4 I don't remember if I did that in the Oracle case or not,
5 but I have done it in some cases. So things like that, I'm
6 open to imposing those if you both agree. Even if you don't
7 agree, if it becomes a problem, I might do it.

8 **MR. VERHOEVEN:** Well, I think we could take a first
9 stab at negotiating things.

10 The way I've done it is very similar to what you're
11 talking about, Your Honor, with the caveat that both sides are
12 reasonable. If, for example -- we're under time limits, so if
13 one side has to cut a witness to make their time limit, then
14 that's something that happens.

15 But as long as the parties act in good faith -- and, for
16 example, for the direct examination exhibits, we may send those
17 over, but something may happen the next day so that we want to
18 add something to deal with it. As long as we can be flexible
19 on that, the disclosure requirements I think we can easily work
20 out.

21 **MR. GONZALEZ:** I agree with that, Your Honor.

22 There's one thing that I would suggest given that they're
23 going first, they're the plaintiff, and that is to help us
24 avoid unnecessary work, is that they give us a realistic
25 witness list. You've now told us 16 hours per side. Well,

1 they have 86 witnesses.

2 **THE COURT:** Well, you agreed to that.

3 **MR. GONZALEZ:** Oh, no, no. We agree.

4 **THE COURT:** You make it sound like you're going to
5 appeal on the ground --

6 **MR. GONZALEZ:** No, no, no, no. I'm making the point
7 that now that we understand that we have 16 hours, I would
8 think that they would be able to cut their witness list from 86
9 to something more realistic so that we can realistically
10 prepare instead of doing what you just said, which is wasting
11 our time putting together witness files for 86 people.

12 **THE COURT:** Well, see, I'm not going to order -- yes,
13 that's a good point; but then if they cut it down to 15
14 witnesses and then there are two others they want to call,
15 you'll be on their case.

16 So I think it's more important that you know who the
17 initial witnesses are going to be in this rolling group so that
18 you can always be prepared for the ones that are going to come
19 up in the next two days. I think that's a reasonable -- I'm
20 not ordering that yet. I think you should meet and confer and
21 come up on a system because you're both going to have to live
22 with it.

23 **MR. GONZALEZ:** Understood.

24 **THE COURT:** And you ought to both -- all right.

25 **MR. GONZALEZ:** Your Honor, may I --

1 **THE COURT:** I'm not going to make them cut back their
2 witness list unless you both were to agree. If you both were
3 to agree you'll do that, you'll each cut it by half right now,
4 okay.

5 **MR. GONZALEZ:** Your Honor, a couple of things.

6 **MR. VERHOEVEN:** We'll -- excuse me.

7 We'll meet and confer on that issue, Your Honor. I
8 believe if you add up the numbers for defendants' witnesses,
9 it's relatively the same number.

10 **THE COURT:** Yeah. It's a big list.

11 **MR. VERHOEVEN:** So we'll -- you know, it may be in
12 both parties' interest to narrow it down, and we'll see if we
13 can't work that stuff out.

14 **MR. GONZALEZ:** Your Honor, especially given the time
15 constraints, we'd like to only call our witnesses once. If
16 they call a witness, may we examine that witness when they're
17 finished?

18 **THE COURT:** It depends. See, sometimes if it's a
19 very short excursion into something else, okay; but if you're
20 going to hijack their case, no, because the plaintiff has a
21 right to put on their case. And so it depends. It depends.

22 If it's a short excursion into some sideshow, okay -- not
23 sideshow, but new topic, yes, I'd let you do that; but, on the
24 other hand, if they call a witness for, say, 30 minutes and you
25 want to do them a two-hour examination, most of which is on

1 something else, probably the answer is no.

2 **MR. GONZALEZ:** Second question, just on procedures,
3 is: Our expert witness who will respond to their expert
4 witness, can that expert witness be in the court?

5 **THE COURT:** Yes.

6 **MR. GONZALEZ:** Thank you.

7 **THE COURT:** That can happen. I assume you both want
8 that.

9 **MR. VERHOEVEN:** Yes, Your Honor.

10 **THE COURT:** The experts can hear the experts.

11 **MR. VERHOEVEN:** Yes.

12 **THE COURT:** Now --

13 **MR. VERHOEVEN:** Does Your Honor sequester?

14 **THE COURT:** All the other witnesses ought to be
15 sequestered, yes --

16 **MR. VERHOEVEN:** Okay.

17 **THE COURT:** -- unless they're a party representative.

18 **MR. VERHOEVEN:** Yes, and the corporate rep not.

19 **THE COURT:** Who's going to be the corporate reps
20 here?

21 (Counsel conferring.)

22 **MR. CARMODY:** I don't think we've made a decision yet
23 on our side, Your Honor. We're working on it.

24 **THE COURT:** Well, okay. You can work on it too then.

25 **MR. VERHOEVEN:** Okay.

1 **THE COURT:** So each of you get -- each corporation
2 gets one.

3 All right. I need to go over a topic on exhibits, which
4 is first you need to vet -- each side needs to vet the exhibits
5 that are given to the deputy courtroom clerk with the actual
6 tag because that's what goes to the Court of Appeals.

7 So I've got to repeat that. You have to vet, look at,
8 physically look at what my deputy has. So let's say Exhibit 17
9 turns out to be something that you thought was a different
10 document or had an attachment that's not there, it doesn't
11 matter. You're not going to be allowed to fix it up after the
12 fact because it's going to go to the Court of Appeals as we
13 have it.

14 And the fact that you thought it was something else
15 because you were relying on a database that your law firm
16 prepared and you thought it was a different document, I'm
17 sorry, I cannot accept that excuse. It has -- you've got --
18 it's easy to check what's in our record.

19 And when you're showing a document to the witness, you've
20 got to use the official version and not a copy. The reason is
21 that about 5 percent of the time the document that you want to
22 show the witness of some copy is not exactly the real document.
23 It doesn't have the attachment maybe or it's missing a page or
24 something's goofy with it.

25 One short war story. We had a jury trial in here once

1 where -- long ago but it still happened -- where the defense
2 lawyer in the closing argument to the jury put something up on
3 the screen that I didn't think was in evidence. So at the
4 break I said, "Is that in evidence?" It turns out it was not
5 in evidence.

6 The defense lawyer had been relying on something the legal
7 assistant had given him thinking that that was what was in
8 evidence but it was actually not what was in evidence. So we
9 had to explain to the jury the mistake. It was really pretty
10 catastrophic for that side because they should never have made
11 that error. They should have checked what was actually in
12 evidence as opposed to not.

13 So it's important to put the burden on you to use the real
14 exhibit, the one that's going to go to the Court of Appeals and
15 the one that goes into the jury room.

16 **MR. VERHOEVEN:** Your Honor, can I ask some
17 clarification on that?

18 **THE COURT:** Yeah. Sure.

19 **MR. VERHOEVEN:** Oftentimes it's sufficient in trials
20 this size to show the witnesses the exhibits on the screen as
21 well as their having a physical copy.

22 **THE COURT:** I'll allow that. I will allow that.
23 That's so the jury can follow it. But then the other side has
24 got to exactly jump up if what's on the screen is not part of
25 that document.

1 **MR. VERHOEVEN:** Thank you, Your Honor.

2 **THE COURT:** Okay. Here's a completely different
3 thing. There is no law on this, it's up to the discretion of
4 the judge, but especially back East -- how many of you lawyers
5 are from back East someplace? Anybody? One, two?

6 Well, back there on the East Coast they have a very almost
7 ironclad rule -- it's not as prevalent out here, but I like to
8 use it -- which is that while a witness is on cross-examination
9 or adverse examination -- it could be called on direct but an
10 adverse examination -- while they're actually on, they cannot
11 talk to the lawyer, the other lawyer. No lawyer can talk to
12 them. Even if it's your own client and your client is going
13 down for the third or fourth time because the other side is
14 beating them up, while they're still on cross-examination, no
15 talking to them.

16 I recommend that rule. Now, it doesn't apply on direct.
17 It's just pointless really. It's just while the other side has
18 got your witness or somebody you brought in, and I recommend
19 that rule and I think you ought to both stipulate to that. So
20 what do you say?

21 **MR. VERHOEVEN:** First, I have a clarification if I
22 might.

23 What about on redirect? In other words, you can't talk to
24 the witness on cross, then you take a break, and is the counsel
25 going to be able to then talk to the witness about all the

1 things they're going to fix from the cross and then do the
2 redirect? Is that what you're suggesting?

3 **THE COURT:** Yes, I would allow them -- I would allow
4 you to have a conference after the cross-examination is
5 concluded so that you could try to fix it up, but we will not
6 take a break to allow you to do that. It might be that you
7 have to do a cold redirect. But if it was overnight and it
8 just happened to fall that way, okay, I can let you -- I'd be
9 okay with that caveat. You could fix it up, woodshed them
10 overnight before the redirect the next morning if the cross is
11 actually completed.

12 But usually it doesn't work out that way because a good
13 lawyer is going to say, "Judge, it's time to quit for today,
14 but I may have a few questions in the morning, so I'm not going
15 to close my cross-examination yet," and, you know, that's not
16 unheard of.

17 **MR. VERHOEVEN:** So I'm good -- as long as it goes
18 both ways, we have no problem.

19 **THE COURT:** Both ways. It goes both ways. All
20 right.

21 **MR. CARMODY:** That's fine.

22 **THE COURT:** Agreed?

23 **MR. CARMODY:** Yes.

24 **THE COURT:** All right. So you both agree. Great.
25 Good for you.

1 Okay. You need to give me a one-page statement that I
2 could read to the jury so I can explain what this case is
3 about.

4 I've already told you we'll be in session five days a
5 week. Now, if we make progress to the point that I think we
6 could safely take off a day, like a Friday -- just once
7 probably -- then we will do that; but otherwise if I think
8 we're in trouble or even just on course, I'm going to -- we're
9 going to go five days a week.

10 I would say your opening statements -- how long do you
11 want for your opening statements?

12 **MR. CARMODY:** An hour.

13 **MR. VERHOEVEN:** I agree, an hour.

14 **THE COURT:** All right. One hour per side.

15 Now, when you are doing a witness, you should fish out the
16 trial exhibits in advance so that you don't have to ask for
17 them. You know, occasionally you'll have to ask for one, but
18 you ought to have your five documents you're going to use, 10
19 documents you're going to use, right there ready to go, hand
20 them up to the witness, or sometimes just put them right there
21 on the witness bench so that the witness has them. But have it
22 ready to go click, click, click. All right?

23 **MR. VERHOEVEN:** I have --

24 **THE COURT:** Oh, I didn't ask Mr. Chatterjee.

25 Do you agree to the rule about while you're on

1 cross-examination, no talking to the witness?

2 **MR. CHATTERJEE:** Yes, Your Honor. I had one small
3 question about that, but I think you answered it, which is --

4 **THE COURT:** By the way, the 16 hours you split
5 between you. It's not -- you each don't get 16 hours. You
6 understand that on the defense side?

7 **MR. CARMODY:** Yes.

8 **MR. VERHOEVEN:** And the same is true for the opening;
9 right? One hour for both of them?

10 **THE COURT:** I think that's right. You've got to
11 split the one hour too unless you convince me otherwise.

12 But let's stick to the 16 first. You understand it's 16
13 for the both of you?

14 **MR. CHATTERJEE:** Yes, Your Honor. We have -- we did
15 file a motion to sever given that their theory now is purely
16 acquisition, and it's really an issue completely disconnected
17 from --

18 **THE COURT:** I have that in mind, but I am not ruling
19 on that. Now, if you go to trial together, it's 16 hours
20 between you. Okay?

21 **MR. CARMODY:** That part we understand. It would be
22 opening statement I would like to talk about.

23 **THE COURT:** All right. Tell me if you think you need
24 more time. Should I -- why don't I give them 15 additional
25 minutes. So you get one hour and they get an hour and 15

1 minutes because you're suing two of them and it's just one of
2 you.

3 **MR. VERHOEVEN:** Well, Your Honor, every trial I've
4 done, no matter how many defendants there are, it's equal time.

5 **THE COURT:** I know. Usually that's right.

6 **MR. VERHOEVEN:** So this would be giving them an
7 advantage to have more time than we do.

8 **THE COURT:** Yes.

9 **MR. VERHOEVEN:** We have to also address the two
10 different defendants.

11 **THE COURT:** All right. What do you say to that
12 point? They've got to address both of you.

13 **MR. CARMODY:** I think 15 minutes, Your Honor, is
14 fair. I mean, the bottom line is we're not completely --

15 **THE COURT:** I'm going to give each of you an hour and
16 15 minutes. I don't want to give you each an hour and 15
17 minutes. It's way too much.

18 **MR. CARMODY:** The reason why I think 15 minutes
19 additional works for us, Your Honor, is we're not completely
20 aligned on all issues.

21 **THE COURT:** Of course not, but they've got to
22 cover -- he's got to cover -- Mr. Verhoeven has got to cover
23 both of you too. I'm giving you, both sides, an hour and 10
24 minutes, and you have got to use your hour and 10 minutes,
25 split it any way you want; and then, Mr. Verhoeven, you get an

1 hour and 10 minutes too on opening statement.

2 **MS. BAILY:** Your Honor, there's a related issue if I
3 may just --

4 **THE COURT:** Of course.

5 **MS. BAILY:** So it was raised just briefly in the
6 pretrial filings, but one issue with respect to the damages
7 experts is there's a lot of overlap between the damages
8 experts. Uber and Ottomotto have one, Otto Trucking has
9 another, and they offer essentially the same critiques of
10 Wagner and it has the effect, of course, of ganging up on one
11 witness.

12 And so I just wanted to --

13 **THE COURT:** If they want to waste their 16 hours by
14 putting in duplicative testimony, why do you care?

15 **MS. BAILY:** Understood.

16 **THE COURT:** That means that something else is going
17 to go skate by. See, they probably know that I'll knock out
18 one of their experts as a *Daubert* challenge, so they're worried
19 that they need two.

20 **MR. CHATTERJEE:** Your Honor, it's because we --

21 **THE COURT:** If you win your severance motion and I
22 knock out, then they've got zero.

23 **MR. CHATTERJEE:** Or the summary judgment, Your Honor.

24 There's one other issue associated with openings. Because
25 Otto Trucking is -- we view ourselves somewhat as a niche

1 player in this case, we would prefer to give our opening
2 statement before we start our case-in-chief rather than at the
3 beginning of the case.

4 **THE COURT:** Yeah, you can do that.

5 **MR. CHATTERJEE:** Thank you, Your Honor.

6 **MR. VERHOEVEN:** Your Honor, I object to that.

7 **THE COURT:** Wait. Wait. Wait. No, they've got the
8 right to do that. You can do that, but then it's still going
9 to come out of the time. So if you use 50 minutes and you only
10 have 20 minutes, but you can reserve your opening statement.
11 What's wrong with that?

12 **MR. VERHOEVEN:** I've never done a trial where halfway
13 through the case one of the parties gets to make a big argument
14 like that.

15 **THE COURT:** Well, it goes back to the common law.
16 This is a time-honored right to reserve your opening statement.

17 **MR. CARMODY:** Absolutely.

18 **THE COURT:** Yeah.

19 **MR. VERHOEVEN:** Well, it's got to come out of the
20 hour and 10 minutes.

21 **THE COURT:** It will.

22 **MR. CARMODY:** We agree.

23 **MR. VERHOEVEN:** And then, you know, I think they need
24 at least in fairness disclose to us how much time they're going
25 to use this advance so that we can, if we need to, reserve time

1 as well.

2 **THE COURT:** You don't get to reserve time.

3 **MR. CARMODY:** You don't get it.

4 **THE COURT:** I think you just get one opening
5 statement.

6 **MR. CARMODY:** That's exactly right.

7 **MR. VERHOEVEN:** So they get two -- they get to argue
8 to the jury twice?

9 **THE COURT:** Correct.

10 **MR. VERHOEVEN:** That's simply inequitable.

11 **THE COURT:** It's not that bad. It's not inequitable.

12 **MR. VERHOEVEN:** Yeah, it is.

13 **THE COURT:** This will work. Please, come on. You
14 will have had your opening statement. You get the benefit of
15 primacy. They get the benefit of having get to see your case,
16 and then they get to make -- but, no, I'm pretty confident
17 that's --

18 **MR. VERHOEVEN:** For the record, I think that's
19 incredibly prejudicial. We can't even address what they say in
20 the middle of the case at the end of our case and the beginning
21 of their case.

22 **THE COURT:** No, because there is a thing that I do
23 which -- but I'm overruling that objection because I don't
24 think that is a fair criticism; but, nevertheless, there is
25 something that I do occasionally in cases, which is, as the

1 case goes along, I will say, "Before we end today at maybe near
2 the end of today I want each of you to give a" -- and I'll make
3 you share time on the defense side -- "a five-minute statement
4 to the jury of where we are in the evidence, where we are in
5 the case, what more you expect to prove."

6 You know, minor argument is okay, but it helps the jury
7 keep a good comprehension of where we are on the timeline of
8 the evidence. So every now and then I'm going to do that. I
9 will do it when I think it would help the jury's understanding
10 of the case.

11 So possibly you will get an opportunity after
12 Mr. Chatterjee has come out of left field and given his
13 reserved opening statement and you're sitting over there all
14 antsy because you want to respond, that's just the way the
15 system works. But, yeah, but maybe you'll get a five-minute
16 opportunity to say something.

17 **MR. VERHOEVEN:** Thank you for that, Your Honor, but
18 why do we not get to reserve but they get to reserve? I don't
19 understand that principle. If the basis is they want to save
20 their opening statement for when they start their
21 case-in-chief --

22 **THE COURT:** Because the opening statement is what you
23 are about to prove and you are the one that goes first.

24 **MR. VERHOEVEN:** But they get to respond.

25 **THE COURT:** Yeah, they get to respond because they're

1 putting on their case later and they want to have a coherent
2 statement of what they're about to bring in and prove.

3 If you find some decision in the history of the universe
4 that says that's wrong, I will look at it, but I'm pretty sure
5 I'm right that there's a time-honored right for a defendant to
6 reserve their opening statement.

7 **MR. VERHOEVEN:** Well, we'll look into that,
8 Your Honor. If we have leave to make a submission, I'd
9 appreciate that.

10 **THE COURT:** Of course.

11 Okay. But otherwise that's the way it's going to be.

12 Okay.

13 **MR. CHATTERJEE:** Your Honor --

14 **THE COURT:** Wait a minute.

15 (Pause in proceedings.)

16 **THE COURT:** Okay. Yes, please.

17 **MR. CHATTERJEE:** There were two other things just
18 associated with kind of the mini argument Your Honor suggested.
19 One of the things --

20 **THE COURT:** Mini statement slash argument. I don't
21 like much argument, but I do like explaining to the jury where
22 we are and what you think has been proven and what -- yeah. It
23 helps the jury.

24 **MR. CHATTERJEE:** One of the things that some of the
25 other judges I've been in front of have liked doing -- well,

1 there's two things. One was to give -- to allow the parties to
2 make a very short introduction of the witness, "This witness is
3 this person and this is their role," to give the jury context
4 when the person is talking. I don't know what Your Honor's
5 view on that is.

6 And the second is jury questions. Do you allow the jury
7 to ask questions?

8 **THE COURT:** Okay. Those are totally different things
9 and remind me to come back to that in a second. I want to
10 finish with my list for a second.

11 I want you to come up with a big poster board that is
12 readable from the jury box that will be over there, and it will
13 be a timeline and it will have the most important -- I'll leave
14 it to your discretion -- seven, eight, or nine dates, like
15 acquisition date or download date. You know, actually -- if
16 it's even controversial, you can't use the word. You certainly
17 couldn't say "Fraud begins here." That's no good. But words
18 that are nonargumentative.

19 Here's why that's so important. When the witnesses are on
20 the stand, even when the judge is listening to the evidence and
21 some witness says, "I went to the March 13th meeting," they can
22 glance over and see where that fits on the timeline, the basic
23 timeline, and they comprehend where that testimony fits better
24 in the case.

25 In addition, I want you to give them an 8-by-10 copy so

1 they can keep it in the back of their steno pad and they can
2 make notes on their own version of it. But just seeing it up
3 there on the wall, it helps them place the testimony in
4 context, and I want you to agree. If you don't agree, I'm
5 going to work it up myself and put it over there.

6 So every lawyer has agreed to this in the past, and I want
7 you to do that.

8 All right. Enough on that. Any problem with that or any
9 questions?

10 **MR. VERHOEVEN:** No, Your Honor.

11 **THE COURT:** Okay. Good.

12 Sidebars. I don't like sidebars. I think when the jury
13 is here, they should be hearing evidence. And lawyers like to
14 call a sidebar because they're deathly afraid the jury is going
15 to hear the judge overrule their objection, so they want to do
16 it in private. Too bad. Too bad. The jury is going to hear
17 me say "Objection overruled, Mr. Chatterjee," or, "You win,
18 Mr. Chatterjee." So it just --

19 **MR. CHATTERJEE:** I prefer the latter.

20 **THE COURT:** I know. You'll get your share of those.

21 But I'm telling you, we can't just come running over here
22 like -- so I'm going to say maybe one sidebar a day on average
23 that lasts three minutes, and even that the jury hates. So I
24 want you to know if you ask for a sidebar, I'm likely to say
25 no.

1 Now, sometimes we'll get into a fix where I can see that
2 we have a problem and I'll ask you to work around it and go to
3 something else and at the break we'll take it up, and we will
4 at the break.

5 But one of the guiding principles of me running a trial is
6 that while the jury is here, they're hearing evidence and their
7 convenience and understanding and comprehension of the case is
8 paramount. So I will be taking that into account.

9 Okay. The next thing that comes up in trials that people
10 aren't ready for, deposition for impeachment.

11 **MR. VERHOEVEN:** Your Honor, I just wanted to, please,
12 so we don't have to do it at trial.

13 **THE COURT:** Yes, go ahead.

14 **MR. VERHOEVEN:** So in my experience with the no
15 sidebars and the preference against sidebars, the only times it
16 would come up for me personally is if -- and obviously it goes
17 without saying you try to address this at 7:30 -- but if, for
18 example, because of a cross-examination you want to ask a
19 question because of a certain answer but you feel that it might
20 be close to a *motion in limine* or something like that, that
21 would be the time that I would ask for a sidebar so that I
22 didn't violate a rule.

23 **THE COURT:** Well, the way I would urge you to do that
24 is to say, "Your Honor, that implicates or that would violate
25 your ruling on *Motion in Limine* Number 14."

1 **MR. VERHOEVEN:** Okay.

2 **THE COURT:** You can just say that, and then I
3 would -- if I remembered it well enough, I would either -- I
4 would rule on it. If I didn't remember it, I might ask then
5 for a sidebar or ask you to postpone it till the break.

6 **MR. VERHOEVEN:** So I was asking just a slightly
7 different question, which is I haven't asked it. I don't want
8 to violate the *motion in limine*. It came up because of cross
9 answers. And so it's not I'm objecting because the other side
10 violated the *motion in limine*. It's just me trying to not get
11 in trouble.

12 **THE COURT:** Yeah, you can ask for it at the break or
13 that would be a legitimate case for a sidebar.

14 **MR. VERHOEVEN:** Yeah. That's what I would envision.

15 **THE COURT:** All right. Next, the use of depositions
16 for impeachment. You've got to have the deposition right there
17 and you read it exactly and you don't paraphrase and you've got
18 to read the whole answer.

19 Okay. First, let me stop there. Do you understand what
20 I'm saying there?

21 **MR. VERHOEVEN:** Yes, Your Honor.

22 **THE COURT:** Now, here's what lawyers like to do and
23 that I don't like to see because it gets abused all the time.
24 You'll say, "In your deposition didn't you say X." Instead of
25 getting the deposition out and reading it to see what they say,

1 you want to fix it up. And you didn't ask the right question
2 in the deposition, you ask a related question but you didn't
3 ask the right question. So you didn't ask about X. You asked
4 about X prime.

5 So the answer is not on point in the deposition, but how
6 are they supposed to know without -- so it's unfair to the
7 witness. It's asking the witness to have -- under the stress
8 of being on the stand to try to remember what in the world they
9 said in the deposition. So you can't do that to them. You
10 can't say, "In your deposition didn't you say X?" You just
11 say:

12 "Your Honor, I want to read from page 32 of the
13 witness' testimony:

14 "Question: What color was the light?

15 "Answer: The light was red."

16 You don't have to say, then, "Didn't you say that in your
17 deposition?" No. I will just tell the jury, "That's the sworn
18 testimony of this same witness in the deposition on such and
19 such a date, and you may consider that in evaluating the
20 witness' testimony."Then we go on.

21 And then you don't get to say, "In your deposition didn't
22 you say X," because I'll promise you, half the time they didn't
23 say X and the witness doesn't -- it's not fair to the witness.
24 It's not fair to -- everybody understand that?

25 **MR. VERHOEVEN:** I do, but I just wanted a

1 clarification on that as well.

2 **THE COURT:** Yeah.

3 **MR. VERHOEVEN:** I mean, we shouldn't be able to just
4 point the witness to his testimony and have him read it in the
5 first instance. We have to ask him the question, and the
6 deposition is used if, for example, it's inconsistent or --

7 **THE COURT:** Well, if it's a party witness, an adverse
8 party, you can use it for any purpose. You don't have to have
9 it be inconsistent. But if it is -- so you can -- you have a
10 lot of flexibility there.

11 But if it is a genuine third party or -- yes, let's say
12 genuine third party and someone other than an adverse nonparty,
13 then you have to first do what you say, lay the foundation.
14 You say, "What" -- you just ask without reference to the
15 deposition, "Okay. Mr. Witness, what color was the light?"

16 **MR. VERHOEVEN:** Right.

17 **THE COURT:** They say, "Oh. Oh. I think the light
18 was green."

19 And then you say, "your Honor, I'm going to read from the
20 deposition, page 32."

21 **MR. VERHOEVEN:** Exactly.

22 **THE COURT:** Or I even -- when they say "I don't
23 remember" and at trial they say "I don't remember," all day
24 long I'll allow you to impeach that with an answer.

25 Or the vice versa. If at the depo they said "I don't

1 remember" and now they suddenly have a sudden burst of
2 recollection because some lawyer has gotten to them, then you
3 get to impeach them with that.

4 **MR. VERHOEVEN:** That's exactly it. Thanks for the
5 clarification.

6 One other question on this is my practice, if allowed to,
7 is to use actual videotape from the deposition that has the
8 words below, but it has --

9 **THE COURT:** Yeah, you can do that. That's fine, but
10 there's a glitch on that, which is that the court reporter --
11 we have the best court reporters in the United States here. I
12 want you to know that. This court reporter, she's won national
13 competitions. I think she was the fastest court reporter in
14 history one day.

15 **MR. VERHOEVEN:** Wow.

16 **THE COURT:** Something like that.

17 Anyway --

18 **MR. VERHOEVEN:** So we can talk fast.

19 **THE COURT:** No, no.

20 But here's the thing, they don't take down video. A lot
21 of lawyers don't know that. Recordings and video do not get
22 taken down by the court reporter. So if you use it, you have
23 to then -- if you use a clip, you've got to give a CD to the
24 courtroom deputy and say, "This is the CD that was used," and
25 only the clip.

1 **MR. VERHOEVEN:** Right.

2 **THE COURT:** You've got to be -- and then the other
3 side has got to agree that that was the one that was used.

4 **MR. VERHOEVEN:** We did -- I'm very familiar with that
5 procedure, but we don't usually do a CD. We usually just do a
6 hard copy of --

7 **THE COURT:** Okay. You can do it that way.

8 **MR. VERHOEVEN:** But we clear it.

9 **THE COURT:** But there's got to be a record --

10 **MR. VERHOEVEN:** Exactly.

11 **THE COURT:** -- otherwise there won't be a record of
12 what was shown.

13 Now, the reason to show the CD, it may be at the Court of
14 Appeals level you want to make the point that, "Oh, look, how
15 evasive they looked on the video."

16 **MR. VERHOEVEN:** I see, the video.

17 **THE COURT:** It looked like they were looking at the
18 ceiling, they took a long time to answer, the pauses and all
19 that. So it's up to you, but you both have to agree on the
20 record that's going to go to the Court of Appeals.

21 Okay.

22 **MR. CARMODY:** Your Honor, I had one question on the
23 party witness.

24 **THE COURT:** Please, go ahead.

25 **MR. CARMODY:** When you talk about with a third party

1 obviously laying a foundation before the impeachment and you
2 said with a party witness you can play it at any time, I
3 understood at first --

4 **THE COURT:** Well, with an adverse party.

5 **MR. CARMODY:** I thought at first, though, you were
6 talking about a 30(b)(6) witness, you can play at any time for
7 any reason.

8 **THE COURT:** Not just 30(b)(6). With a party witness
9 let's say -- let's say that -- let's see, you're Uber, so who
10 would be Mr. Big at Waymo? Name somebody.

11 **MR. CHATTERJEE:** Larry Page.

12 **THE COURT:** Larry Page, okay.

13 So Larry Page. You have a deposition of Larry Page. You
14 can just read any part of it anytime you want. You can
15 interrupt your examination of a witness and say, "I want to
16 read you, to the jury, a page from Larry Page to set the stage
17 for some more questions I have for you." And since it's an
18 adverse party witness, the Rule 32 just says flat out you can
19 use it.

20 Now, you can't use your own side's because that's
21 self-serving, but you can use the other side's. They have to
22 be a managing agent, director, or officer, I think, to use it
23 but he would qualify in that case.

24 **MR. CARMODY:** That was the --

25 **THE COURT:** And if it's 30(b)(6), of course, you can

1 use 30(b)(6) in the same way.

2 **MR. CARMODY:** See, that was the question I had.
3 Obviously Larry Page would qualify as a managing agent for
4 Google or Waymo here, but I'm talking about other, you know,
5 adverse witnesses, Waymo employees, but not managing agents.

6 **THE COURT:** Well, an adverse employee may or may not
7 qualify as a Rule 32 adverse party. Like this guy Sasha, is he
8 still -- where does he work now?

9 **MR. CHATTERJEE:** Waymo.

10 **THE COURT:** Is he at your company?

11 **MR. CHATTERJEE:** He's at Waymo.

12 **THE COURT:** No, he's over there, that's right.

13 Well, I don't know if he qualifies as a managing agent,
14 officer, or something. We'd have to fight over that. You two
15 would have to fight over it. I don't know the answer to that.
16 See, he may not be high enough. So he might be somebody where
17 you could not do that. You could use it to impeach him, but
18 you could not use it necessarily to -- and I'm not making a
19 ruling on this -- just to read it, use it to quote any purpose
20 within the meaning of Rule 32.

21 **MR. CARMODY:** That was the reason I asked the
22 question, because it seems to me there's a pretty limited
23 universe of people who are managing agents, but most people on
24 the other side are adverse witnesses and it seems like you need
25 to lay a foundation.

1 **THE COURT:** Yeah, it's probably 50-50 whether or not
2 I think you have to show that they qualify within the meaning
3 of the rule.

4 **MR. CARMODY:** Yeah.

5 **THE COURT:** Okay. Next, we will -- I want you -- I'm
6 not saying we'll get there, but on the first day you should at
7 least have one witness ready to go in case we get to the
8 witnesses.

9 I don't need a copy of all the trial exhibits myself. I
10 think, in my view, if each of you pick out the top 20 and give
11 it to me in a notebook, that's all I want. I promise you the
12 top 20 will cover 80 percent of the trial. So that's all I
13 need.

14 Okay. I want to come back to no coughing. I know people
15 make fun of me on this, but I want to explain why I have this
16 rule. No coughing and no paper shuffling.

17 When Mr. Verhoeven is standing there and he's got the
18 witness on the stand and the witness is going down for the
19 third time, Trick Number 48 is start coughing on the other side
20 so that the jury will be distracted and won't hear it.

21 When I was a practicing lawyer, I tried a number of cases
22 and I came to realize that when I -- in the rare occasions I
23 had them on the ropes, that was what happened.

24 And the other thing is to shuffle a lot of papers, make
25 noise and shuffle papers and move around. Don't do that.

1 If you start hacking and coughing, I hold this up here, I
2 say, "Mr. So-and-So, do you need a cough drop?" Then I
3 explain, "I can't hear up here whenever you're coughing." And
4 so then I let the other side go back over all of the bad
5 testimony again because I didn't hear it.

6 So those of you who've tried cases here know this, that if
7 you have the floor, you have the floor here and no one is going
8 to be distracting you and you get to be an advocate. And an
9 advocate, if you frame the right question, that witness is
10 going to go down for the third time. That's great. That's the
11 American way.

12 So I believe in advocacy, and that is the real reason I
13 don't like the coughing. Even though the lawyers like to make
14 fun of me about it, okay. But I believe in advocacy and I want
15 you to have the undivided attention of the jury.

16 So I believe very strongly in that, so please honor the
17 right. They are going to honor your right to make their
18 witnesses go down for the third time too.

19 **MR. VERHOEVEN:** Your Honor, that doesn't apply to
20 squeaky chairs, does it?

21 **THE COURT:** Yes, it does.

22 **MR. VERHOEVEN:** I got in trouble for a squeaky chair.

23 **THE COURT:** No squeaky chairs.

24 **MR. VERHOEVEN:** Okay. We'll bring our WD-40.

25 **THE COURT:** Yeah. Get WD-40 in here; or you identify

1 the squeaky chairs, I'll get it fixed.

2 **MR. VERHOEVEN:** Okay.

3 **THE COURT:** All right. You know, for you members of
4 the public, I can't stop you but I tell you this, I don't even
5 like people -- if you're associated with one of the law firms
6 here, no going in and out of the door while the witness is on
7 the stand because it's the same problem. The jury will look
8 out and see, "Who's that coming? Who's that going?" No, we
9 want the jury -- this is a hard case to understand and I want
10 to jury to understand it.

11 Okay. Occasionally we're going to have -- a new subject
12 here.

13 Occasionally we're going to have fights over something
14 that happened in discovery and you're going to say, "That's so
15 unfair. They should not be allowed to do that. We asked him
16 that question in Interrogatory 89 and they dodged it." Okay.
17 I've learned the hard way you've got to have your discovery
18 records here in court. I will not take your word for it.

19 So if you tell me they didn't -- it's got to be proven up
20 chapter and verse or you're not going -- you know, life is too
21 short.

22 Sometimes a lawyer can convince me with chapter and verse
23 that, yes, this is very unfair what they're trying to do, but
24 you've got to have it in writing. You can't -- it's got to be
25 clear-cut and no "I believe," no verbal representations. It's

1 got to be -- so have your material here in court.

2 Stipulations. If you want a stipulation to be in the
3 record, it's got to be read to the jury. You don't get to put
4 it in writing and it goes in. That just gives it too much
5 weight.

6 So what you do is you take up part of your time. You say,
7 "Judge, we'd like to read Stipulation Number 8." So
8 Mr. Verhoeven reads it to the jury exactly slowly. And then I
9 ask the other side, "Do you so stipulate?" They will say,
10 "Yes." And I then tell the jury, "That's now evidence in the
11 case." So then it is evidence in the case, but that's the way
12 we do stipulations.

13 We have an electronic jury evidence cart that is explained
14 on the Court's website so that the jury during their
15 deliberations can see things that are electronic that are in
16 evidence, only things that are actually in evidence, like in a
17 criminal case you might have a recording of a drug deal, or in
18 this case it may be a recording of something else, or a video
19 maybe.

20 All right. Those are the things I've got on my list, but
21 you had a couple more, Mr. Chatterjee, and I cut you off, so
22 please go back to those.

23 **MR. CHATTERJEE:** Yeah, they were two fairly small
24 issues, Your Honor.

25 One thing that I had was in some other judges' courtrooms

1 in this district the judges have said it's been helpful to the
2 jury to give a very short introduction of who the witness is
3 when they take the stand. And I don't know if Your Honor
4 has --

5 **THE COURT:** Well, give me an example of -- I mean,
6 usually the witness is introduced who they are anyway.

7 **MR. CHATTERJEE:** It would be something, like we
8 talked about Mr. Haslim, Mr. Haslim is a senior engineer at
9 Uber. That would be an example because it gives them a context
10 for who they're listening to.

11 **THE COURT:** But why -- you mean I would do that or
12 you would do that?

13 **MR. CHATTERJEE:** The lawyer taking the direct
14 examination.

15 **THE COURT:** All right. But when they testify,
16 they're going to say, "Who are you?" "I'm a senior engineer at
17 Uber."

18 **MR. CHATTERJEE:** I understand, Your Honor. I'm just
19 saying a lot of judges have found that helpful.

20 **THE COURT:** If you-all want, both sides, do it, fine.

21 **MR. VERHOEVEN:** I would object to that. I would
22 negotiate with the other side and see if we can reach agreement
23 on if we stipulate to call a witness by video, allowing the
24 attorney to introduce who the witness is before the video gets
25 played because --

1 **THE COURT:** Otherwise the jury -- it may not be so
2 clear.

3 **MR. VERHOEVEN:** Yes, exactly.

4 **THE COURT:** All right. I'm inclined in the direction
5 of Mr. Verhoeven on that one; but if you two stipulated to it,
6 I don't see a problem, but I also think it's easy to fix by
7 asking that as the first question.

8 **MR. CHATTERJEE:** And then the second question,
9 Your Honor, was juror questions. What's your practice on that?

10 **THE COURT:** Okay. That's a different thing. I allow
11 the jury to submit written questions all through the trial, and
12 I will tell them that they're free to submit them and they
13 don't have to, and I explain how it works.

14 And the way it would work is that I get a question at a
15 break -- well, first, if I get a question, I may -- if it's a
16 straightforward one, I may deal with it immediately and just
17 give it to the lawyers.

18 But I usually would wait until the next break and then
19 give it to the lawyers, and then you decide how you're going to
20 address it if at all, and I'll leave it to your discretion
21 whether to address it.

22 And I tell the jury that's the way I'm going to deal with
23 it, is that sometimes -- I would say 90 percent of the time the
24 lawyers find a way to address it. So I think it's a good thing
25 to let the jury be engaged and to ask questions.

1 Any objections?

2 **MR. VERHOEVEN:** Just, again, clarification. I mean,
3 from my experience -- I've never done that before, Your Honor,
4 but in my experience, the closest thing is questions from the
5 jurors when they're deliberating, and oftentimes there's an
6 argument between counsel about what's permitted to say or not.

7 **THE COURT:** Once they're in deliberations, it's a
8 different story because then we've got to be very careful on
9 what we say in response to a question. That, I -- I'm talking
10 about questions as the evidence comes in. I thought that's
11 what you were talking about.

12 **MR. CHATTERJEE:** Yes, Your Honor, that is what I'm
13 talking about.

14 **THE COURT:** As the evidence goes along, and then I
15 think it's good for the jury to be allowed to ask those
16 questions. And if they -- sometimes they come up with great
17 things like, you know, "What day did you even start working at
18 the company?" You know, they don't ask questions -- like, they
19 know enough not to ask questions like "Is there insurance in
20 this case?"

21 **MR. VERHOEVEN:** All I'm saying is before one side or
22 the other goes off answering the question, I think that each
23 side should have an opportunity to know what they're going to
24 say and whether it's inappropriate or not.

25 **THE COURT:** I don't agree with that. If it's a

1 problem -- let's say that you are examining a witness and then
2 we have a break and I hand you a note from a juror when they're
3 in the break room saying, "When did so-and-so start with the
4 company? When did the witness start with the company?" I'm
5 not going to let you-all have an argument, a minitrial with me
6 over whether you get to answer that.

7 That will be the very next question that you ask whenever
8 they come out probably, and I'm not going to let them try to
9 sabotage your ability to answer that question and like you
10 can't sabotage their ability.

11 Now, if it's something that could get into dangerous
12 territory, okay, then we may have -- and it may be that I order
13 you-all to ignore the question.

14 **MR. VERHOEVEN:** Exactly. And that's all I'm
15 referring to. So, for example --

16 **THE COURT:** In that case, we would have a discussion
17 among all of the lawyers.

18 **MR. VERHOEVEN:** Okay. Thank you, Your Honor.

19 **MR. CHATTERJEE:** So, Your Honor, I do have one
20 additional question about that and it's purely a logistical
21 one, which is: How do you go about soliciting the questions?
22 It sounded like you might take questions in the middle of
23 examination.

24 **THE COURT:** Yeah.

25 **MR. CHATTERJEE:** And so --

1 **THE COURT:** I just let them submit it to me anytime.
2 Usually they give it to the clerk when they're walking out to
3 the jury room or when they come back from a break. Yeah, and
4 then I get them up here and I -- as soon as is practical, I
5 give it to the lawyers -- so you can see what's on the mind of
6 Juror Number 10.

7 **MR. CHATTERJEE:** Okay.

8 **MR. VERHOEVEN:** I think that's a terrific practice.

9 **THE COURT:** I tell them up front they can ask
10 questions in writing and give it to the clerk.

11 **MR. CHATTERJEE:** The reason I was asking, Judge, is
12 some judges wait until the end of the examination and solicit
13 questions and then they do it, but this is fine too.

14 **THE COURT:** Then it may be too late. I think it's
15 better to -- then you've got to go back.

16 **MR. CHATTERJEE:** That's fine.

17 **THE COURT:** No, I think it's better to just give it
18 to you as it comes up. And that may mean that the lawyer who
19 has the stand at the moment, the lectern at the moment, is the
20 one that gets to clarify it.

21 And, believe me, that's not going to win the case for
22 somebody, you know, the fact that Mr. Verhoeven was the one
23 that helped that juror out by clearing that point up. Just I
24 don't even think they remember who helped them out.

25 So, okay. Any other questions you got for me?

1 **MR. VERHOEVEN:** I have three.

2 **THE COURT:** Yep.

3 **MR. VERHOEVEN:** First, maybe you covered this, but I
4 didn't write it down, the subject of peremptories.

5 **THE COURT:** Each side gets -- what? -- three. Your
6 side gets three total. So you have to agree on how you're
7 going to exercise your three.

8 **MR. VERHOEVEN:** I wonder if with a 10-person jury
9 that's --

10 **THE COURT:** That's perfectly enough. It's too many.

11 **MR. VERHOEVEN:** Okay.

12 **THE COURT:** Because we're going -- in addition, you
13 get for-cause challenges, so three's plenty.

14 **MR. VERHOEVEN:** Okay. Thank you.

15 And second question is, inevitably in these technology
16 trials there's objections about an expert testifying beyond the
17 scope of his report. Does Your Honor have a practice on that?

18 **THE COURT:** Yes, I do. On direct examination they've
19 got to stick to the report and if there's an objection that
20 it's not in the report, then I ask you to tell me where it is
21 in the report; and if it's not there, then I tell the jury to
22 disregard what the witness said. It's got to be in the report.

23 **MR. VERHOEVEN:** And that's all done live in front of
24 the jury?

25 **THE COURT:** For both sides.

1 Now, but, but, here's a very important thing, let's say
2 that you're the proponent of the witness, so you've got to
3 stick to the report, exactly what's in the report. You can
4 omit things.

5 **MR. VERHOEVEN:** Right.

6 **THE COURT:** That's okay. If they've got five
7 opinions, you just want one, you can -- all right. But now
8 it's the other side's turn. They're not stuck with the four
9 corners of the report. So they may want to get into things
10 that go beyond the four corners of the report, especially
11 things to impeach them.

12 And I promise you it happens all the time, then they open
13 the door for you on redirect to go into things that were never
14 in the report; and they're jumping up and down saying, "It was
15 not in the report." I say, "Too bad. Too bad. You opened the
16 door because of your cross-examination."

17 So be aware. This works both ways. It happens a lot.
18 You're not limited to the four corners of the report if the
19 other side on cross opens the door.

20 **MR. VERHOEVEN:** And then one follow-up on that. I
21 understand everything you just said, but the experts are going
22 to be sitting here at trial. Is it impermissible for them to
23 allude back to testimony that they heard?

24 **THE COURT:** Correct. That's one of the great ironies
25 and paradoxes, I think, of the -- unless you both want -- if

1 you both stipulated to let them to do that, I would say fine.
2 If you both stipulated to a rule that they can comment on what
3 the other side said even though it's not in their report, I
4 would be okay with that; but, you see, the -- this is a
5 historical thing.

6 The rule says you're stuck with what's in the report.
7 Stick to the four corners of the report. That rule is more
8 recent than the ancient practice of having the experts in the
9 courtroom to hear what the other side says. What's the point
10 of having them in here to hear what the other side says if
11 they're stuck with the four corners of the report? I've often
12 wondered that.

13 Well, it does come up occasionally. It could come up on
14 cross-examination, so let's say your expert sticks to the four
15 corners, and then you get to say on cross, "Well, you were
16 here. You heard what my expert said. Isn't he right about A
17 and isn't he right about B?" That would be perfectly
18 legitimate because you're not stuck with the four corners of
19 the report on cross-examination.

20 So there is a role for having them in the courtroom even
21 though they can't -- on direct they cannot exceed the four
22 corners unless you two stipulate -- you three. I would be
23 happy to have you do that, but I'm also -- I doubt that you
24 will, so I will just leave it to your discretion.

25 **MR. VERHOEVEN:** Thanks for those clarifications.

1 It's very helpful, Your Honor.

2 The last question I have is I heard what you said about
3 only using the tabbed original exhibits with the witnesses.

4 **THE COURT:** Well, not tabbed. Just the marked.

5 **MR. VERHOEVEN:** Marked.

6 **THE COURT:** The ones that are labeled.

7 **MR. VERHOEVEN:** Right. Yeah. So what we often do is
8 have a binder for the witness of the exhibits to make it go
9 fast.

10 **THE COURT:** Yeah, but then it turns out the exhibit
11 binder has got a mistake in it. So I would rather you give
12 them the original.

13 **MR. VERHOEVEN:** Okay.

14 **THE COURT:** If both sides would stipulate to some
15 alternative that allowed the witnesses to see these big
16 binders, I would be open to listening to you on that; but in
17 the absence of an agreement, I'm going to stick to my
18 tried-and-true method that you've got to use the ones that go
19 into the jury room and to the Court of Appeals.

20 **MR. VERHOEVEN:** All right. We'll discuss with the
21 other side. Maybe we can have a procedure where they inspect
22 the exhibits binder before the witness gets on the stand or
23 something.

24 **THE COURT:** Maybe. Maybe.

25 **MR. CARMODY:** I mean, it seems like you could just

1 hand me -- if you're going to use five exhibits with the
2 witness, you could go get the official exhibits, set them
3 there, the witness has them, and then you can use the big
4 screen to move along.

5 **THE COURT:** That's the way I make the lawyers do it
6 even in big cases; but if you agree to something else and you
7 both stipulated, then -- but the thing is you've got to
8 stipulate to what happens when there's a mismatch and it's not
9 the original, it's not the actual exhibit because of some
10 clerical error but the clerical errors could be exceedingly
11 important. If there's no -- for example, if the exhibit is
12 missing a page, wow, that could be important.

13 Okay. You had three things. What's your other one?

14 **MR. VERHOEVEN:** I think that was all three,
15 Your Honor.

16 **THE COURT:** Okay.

17 **MR. CARMODY:** I had one thing, Your Honor.

18 **THE COURT:** Please, go ahead.

19 **MR. CARMODY:** When you talked about the witness
20 making sure they stick by their report, I'm trusting you mean
21 their opening report; in other words, they can't cure something
22 in rebuttal.

23 **THE COURT:** Right. Here's the way it works. Opening
24 report, you're stuck with what's in the opening report. You
25 cannot jump forward to the reply.

1 **MR. CARMODY:** That's what I thought.

2 **THE COURT:** Mr. Verhoeven, do you understand? I want
3 to make sure you understand this. You cannot jump forward to
4 what's in the reply report. You have to stick with the opening
5 report.

6 And then we hear the other side and their expert maybe
7 comes in, maybe not; and then on your rebuttal case you get to
8 bring your original guy back to put in the reply.

9 Now, why is this? There's several reasons. Abuse
10 Number 89 is that the opening report is not so good, not a good
11 workmanlike job, and the lawyer realizes that after they see
12 the other side's. And so then they try to fix it up in the
13 reply and it's very unfair.

14 Well, it could be that the way this could easily happen
15 that that expert on direct then gets on cross and is blown out
16 of the water so that you don't even have to bring in the other
17 expert, and so the reply never sees the light of day. That
18 could happen.

19 So to make the system work more honestly, you've got to --
20 you don't get to advance forward anything in the reply until on
21 your direct testimony.

22 Now, on the other hand, if on cross-examination the door
23 is open to that -- on your case-in-chief, I'm using you as an
24 example, you've got to stick to the four corners but then the
25 cross-examination opens the door to all kinds of things. Well,

1 of course, even if it's in the reply, it gets to come in
2 because you opened the door.

3 But if you stick -- if you don't open the door, then the
4 reply never sees the light of day until the rebuttal case.

5 **MR. CARMODY:** Okay.

6 **THE COURT:** All right. And for you the surrebuttal
7 case.

8 Okay. I see two more lawyers who have questions.

9 (Counsel conferring.)

10 **THE COURT:** Help me understand something here.

11 Mr. Carmody, are you going to be the lead lawyer?

12 **MR. CARMODY:** Yes, sir.

13 **THE COURT:** Okay. So is MoFo going to have a role in
14 the trial? What is --

15 **MR. CARMODY:** Oh, yeah. We're all together. A happy
16 family.

17 **THE COURT:** All right. In other words, I ask that
18 because MoFo is a potential witness in the case, so didn't we
19 deal with that in an earlier hearing and I said that we were
20 not going to identify what law firms we were with?

21 **MR. GONZALEZ:** Correct.

22 **MR. CHATTERJEE:** Correct.

23 **THE COURT:** All right. So -- okay. That's what I
24 want to do unless -- all right. That's what we're going to do.
25 Okay.

1 **MS. DUNN:** Can I clarify one thing on the experts?

2 **THE COURT:** Sure.

3 **MS. DUNN:** So let's say your cross-examination of the
4 expert is, "Sir, you didn't address X in your report; right?"
5 And the answer is, "No." So then my understanding is that they
6 can't then come back on redirect and say, "Oh, in your reply
7 you put this in," because the whole point is you didn't do it
8 in your opening report and that needs to be saved for rebuttal.

9 **THE COURT:** I usually would agree with you. I can't
10 say every time but, yeah, that criticism that "You didn't
11 consider X in your opening report -- you didn't consider X, did
12 you," they've got to say, "Yeah, that's true, I didn't consider
13 X," I don't think that opens the door to what's in the reply;
14 but there could be circumstances where the way it comes out it
15 does open the door, and I don't want to be locked into that.

16 **MS. DUNN:** I understand. It's different than a
17 methodological cross but saying "You didn't put X, so I
18 appreciate Your Honor's clarification.

19 **THE COURT:** But let's say the next question was
20 something like, "Well, if you had to know that kind of an
21 analysis, what do you think it would have shown?" They could
22 say, "Well, I did that exact thing in the reply report and
23 here's what it shows."

24 **MS. DUNN:** That makes sense. We understand and
25 appreciate the clarification.

1 **THE COURT:** All right. Mr. Gonzalez?

2 **MR. GONZALEZ:** Your Honor, two very quick things.

3 One is jury questionnaire. We submitted a proposal to the
4 Court. We need to finalize it so we need to get your blessing.
5 It was a stipulated questionnaire, so I don't think there
6 should be an issue.

7 **THE COURT:** I know that you -- I asked you to comment
8 on Question 9, and I think we adopted that; right? So we did.

9 And then you gave us an incredibly long list of witnesses
10 that we'll have to put in microscopic print on the back to
11 circle the names of anybody. We'll have to give special
12 glasses to the venire to be able to read it. But, yeah, I'm
13 planning on handing that out.

14 **MR. GONZALEZ:** All right. So you're going to take
15 care of that?

16 **THE COURT:** Aren't we going to take care of that?

17 Yeah. We'll take care of that, I think.

18 **MR. GONZALEZ:** All right. And then the second issue
19 is challenges for cause.

20 **THE COURT:** Yes.

21 **MR. GONZALEZ:** What is your -- I read your order and
22 your order doesn't address it.

23 **THE COURT:** What do you mean?

24 **MR. GONZALEZ:** How do you do them?

25 **THE COURT:** Well, usually they're done out of the

1 presence of the jury unless it's so obvious that I might say,
2 "Can I have a stipulation to excuse Mr. So-and-So?"

3 But most of the time if I think it's even arguable one way
4 or the other, I would wait till the next break and then I would
5 say, "Okay. Any challenges for cause?" Then you would say,
6 "Yeah, we want to challenge 1 and 2." Then I would hear you
7 out on that, hear the other side out.

8 **MR. GONZALEZ:** Thank you, Your Honor.

9 **THE COURT:** That's the way it works.

10 **MR. EISEMAN:** Your Honor -- oh, Mr. Carmody?

11 **MR. CARMODY:** No, I'm fine.

12 **MR. EISEMAN:** One clarification, on the juror
13 questionnaire, Question 9, we had understood that the Court was
14 going to mail that questionnaire out.

15 **THE COURT:** No. No, no, no. They're going to fill
16 it in when they get here in the courtroom, and you will not get
17 the answers until that person is called forward.

18 **MR. EISEMAN:** Understood, Your Honor.

19 **THE COURT:** I don't want anybody -- I know you
20 promised me you won't do that, but I don't want any possible
21 jury consultant or somebody sneaking that and invading the
22 privacy of those jurors, but I will give it to you when they
23 show up.

24 The one thing that we ought to discuss is if there is an
25 obvious question like "I hate Uber." Let's say they said, "I

1 hate Uber and I wouldn't use Uber if it was the last cab on
2 earth." I would just excuse that person. You're not going to
3 get a chance to rehabilitate them.

4 So you will get -- we'll get a few of those on both sides.
5 They could say the same thing about Google. So I think that's
6 a small problem that I think you will both agree to and we'll
7 solve that later.

8 **MR. EISEMAN:** Thank you, Your Honor.

9 **THE COURT:** Here's another problem we need to
10 address. You know how I feel. I feel the public should hear
11 as much of the evidence as possible, so I want the parts that
12 have to be on a closed courtroom -- right now I'm just talking
13 trade secrets. I think we ought to try to segregate that to a
14 given day or you come up with a practical way so that we don't
15 have the problem of having to send witnesses -- I'm sorry --
16 the public in and out of the courtroom.

17 So think about that in your organization of witnesses,
18 that we have a segment where the courtroom's cleared, the jury
19 can hear it; but what we don't have is in, out, in, out, over
20 the course of a day. It just is not good for the -- it's not
21 good for the jury because there's all that disruption, but at
22 the same time the public has a right to hear what goes on in
23 their District Court.

24 I think I've run out of questions. Do you have anything
25 that I forgot? She says no.

1 I will see you again what day? Next week on the motion
2 for continuance. I still am trying my best to keep the trial
3 date on October 10th. It would be a major disruption in my
4 calendar to move it, but I am going to be fair to both sides,
5 and I want to see you back here on the 3rd?

6 **THE CLERK:** Yes. At 10:30.

7 **THE COURT:** What day is it?

8 **MR. VERHOEVEN:** It's October 3rd.

9 **THE COURT:** The 3rd?

10 **MR. VERHOEVEN:** Yes.

11 **THE COURT:** And what time will you be here? Do we
12 have a time?

13 **THE CLERK:** 8:00 o'clock.

14 **THE COURT:** 8:00 o'clock. Okay.

15 So unless you have more, it's now almost 1:00 o'clock, we
16 will break for now, and then I will see you on October 3rd.
17 All right?

18 **MR. VERHOEVEN:** Thank you, Your Honor.

19 **MR. CARMODY:** Thank you, Your Honor.

20 **THE COURT:** All right. Good luck to both sides.

21 (Proceedings adjourned at 12:39 p.m.)

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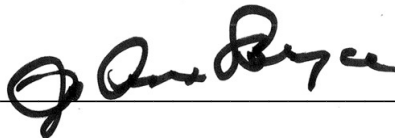
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, September 27, 2017



Jo Ann Bryce, CSR No. 3321, RMR, CRR
U.S. Court Reporter



Lydia Zinn, CSR No. 9223, FCRR
U.S. Court Reporter